

---

**(1975) 10 OHC CK 0013**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 167 of 1972**

|                                        |    |            |
|----------------------------------------|----|------------|
| Dandapani Sahu                         | Vs | APPELLANT  |
| Konchada Panduranga Subudhi and Others |    | RESPONDENT |

---

**Date of Decision :** 30-10-1975

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27  
Criminal Procedure Code, 1973 (CrPC) — Section 107, 144  
Orissa Land Reforms (Amendment) Act, 1973 — Section 28, 29, 33, 35A, 36  
Orissa Land Reforms Act, 1960 — Section 2(21), 24(2), 26, 26(2), 3

**Citation :** (1975) 41 CLT 1320

**Hon'ble Judges :** R.N. Misra, J

**Bench :** Single Bench

**Advocate :** S.N. Murty and B.K. Pal, for the Appellant; R. Mohanty, for the Respondent

**Final Decision :** Dismissed

---

## Judgement

R.N. Misra, J.—Defendant No. 1 is in appeal against the affirming judgment and decree of the learned Subordinate Judge of Berhampur in a suit for declaration that the Defendants have no right, title or interest in the disputed property described in "A" schedule of the plaint and for permanent injunction or alternatively for recovery of possession.

2. The disputed property is 1.74 acres in extent appertaining to Survey Nos. 39, 42/B and 54/B of village Sankarpur of Berhampur town. K. Ramamurty Subudhi was the recorded owner. Plaintiff is one of his sons. It is alleged that in family partition this property had fallen to the share of Ramamurty under a registered deed of exchange dated 20th June, 1961. It has been allotted to the Plaintiff. During Plaintiff's minority, his father was looking after the property till 1964 and from that year Plaintiff's divided brother, K. Visweswar Rao Subudhi looked after the property. One Bhaigo Sahu who happens to be the father of the Defendants 1 and 2 and husband of Defendant No. 3 was a bhag tenant in respect of the disputed property and executed a Muchalika on 26-11-1955. Bhaigo Sahu died

on 9-6-1966. Plaintiff's plea is that Bhaigo Sahu's right was personal in character and terminated with his death. Defendants are trespassers in possession. As a fact, it is pleaded that after Bhaigo's death, Plaintiff entered into possession and cultivated the property personally. Defendants 1 to 3 created trouble. Several proceedings under Sections 107 and 144 of the Code of Criminal Procedure were taken but the Defendants continued to create trouble. Plaintiff obtained a certificate of being a minor from the Collector under the Orissa Land Reforms Act (hereinafter to be referred to as the "Act"). But as the Defendants continued to create trouble, the suit was filed on 16-8-1966.

3. Defendants filed a joint written statement claiming that Defendant No. 1 was cultivating the disputed land under the father of the Plaintiff as also under the Plaintiff himself. Bhaigo was in an ailing condition for a bout five years prior to death and the Defendant No. 1 was paying the Rajbhag to Plaintiff's father and later to K. v. Isweswar Rao Subudhi. Shortly stated, the defence is that Defendant No. 1 is actual a bhag tenant and therefore, he is not liable for eviction.

4. The trial Court held:

(i) Bhaigo only was the bhag tenant and with his death tenancy came to an end; and

(ii) Defendant No. 1 was never a tenant and acquired no such right. He is a trespasser in possession.

On the findings, the learned Trial Judge decreed the suit.

5. Defendant no 1 appealed and claimed that it was not Bhaigo alone but he too was accepted as a tenant along with Bhaigo. The learned Appellate Judge on a detailed consideration of the materials on record upheld the findings of the trial Court and dismissed the appeal.

6. In second appeal, an application for additional evidence has been filed under Order 41, Rule 27 of the CPC and two documents have been tendered for acceptance as additional evidence, namely an application said to" have been made by the Appellant to the Revenue Officer at Berhampur purporting to be u/s 36-A of the Act and the order made by the Revenue Officer on the said application in Case No. 230 of 1975 on 13-6-1975. Admittedly these are documents which were not in existence when the litigations were pending in the original Court and even in the first appellate Court. As a fact, both the documents are dated 13-6-1975. Therefore, they could not have been produced at any earlier stage in the litigation.

As indicated above, the first document is the certified copy of an application while the second one is the certified copy of a judicial order. About the authenticity of these documents, there is no scope to doubt. In view of the change in law, it is conceded that the proceeding u/s 36-A of the Act lies and accordingly, the application has been made and an order obtained. I do not think

it would be appropriate to reject the application of the Appellant for receiving these two documents as additional evidence.

A counter affidavit has been filed challenging the contention in the application for additional evidence that the suit is not maintainable in view of Section 36-A of the Act. But no serious objection has been indicated against receiving additional evidence. Accordingly, I allow the application under Order 41, Rule 27 of the CPC and direct that the certified copy of the application u/s 36-A of the Act be marked as Ext. L and the order of the Revenue Officer dated 13th June-, 1975, be marked as Ext. M.

7. The next point for consideration is as to what is the effect of the proceeding instituted u/s 36-A of the Act. Section 36-came into the statute book by amendment of the Act under President's Act 17 of 1973 with effect from 2.10-1973. The provisions read thus:

Notwithstanding anything contained in the foregoing provisions of this Chapter but, subject to the provisions of Sub-section (2) of Section 24, where neither the landlord nor the tenant, having a right to make an application u/s 26 in respect of any land, has made such application, the Revenue Officer may, on an application made in that behalf by the tenant within two years from the commencement of the Orissa Land Reforms (Amendment) Act, 1973 (President's Act 17 of 1973) and after giving the parties interested an opportunity of being heard, declare the whole of such land to be non-resumable and determine the fair and equitable rent and the compensation payable by the tenant in respect of the land in accordance with the provisions of Section 28 and on such determination, the provisions of Section 29 to 33 (both inclusive), 35-A and 36 shall, so far as may be, apply.

Undoubtedly the application made u/s 36-A is within time as contemplated under that section. As it appears from Ext. 5, an application was made by the Defendant No. 1. Appellant u/s 26(2) of the Act for determination of the non-resumable land in respect of his tenancy. This was registered as Case No. 324 of 1967. The Plaintiff took the stand that he was a person under disability as defined in Section 2(21) of the Act. Therefore, the Defendant No. 1 under Ext. 3 withdrew the application. If the Plaintiff continued to be a minor, the provisions of Section 36-A of the Act would not have applied in view of Section 24(2) of the Act. But as it appears, Plaintiff's minority has ceased long before and the application u/s 36-A of the Act cannot be thrown out on that ground. It would follow, therefore, that the application u/s 36-A of the Act is prima facie maintainable.

8. The next question for consideration is as to whether the bar of maintainability of the suit as provided u/s 67 of the Act is attracted. Admittedly the second appeal was pending when the provision was introduced into the Act by amendment. Law is settled that there should be no ready inference against ouster of jurisdiction of the civil Court. It is equally clear that a right would not

be taken away with retrospective effect unless the statute expressly provides for the same. Section 67 of the Act provides:

Save as otherwise expressly provided in this Act no civil Court shall have jurisdiction to entertain any suit or proceeding so far as it relates to any matter which any officer or other competent authority is empowered by or under this Act to decide.

The dispute u/s 36-A of the Act is a matter reserved for the Revenue Officer for disposal. Admittedly if the application u/s 36-A of the Act is to succeed, Plaintiff would not be entitled to any relief in the present suit Section 3 of the Act provides:

Save as otherwise provided the provisions of this Act shall have effect, notwithstanding anything to the contrary in any other" law, custom or usage or agreement, decree or order of Court.

The provisions of the Act are of overriding character.

If the application u/s 36-A is maintainable, because a new right has been conferred, even if the suit is pending in second appellate stage, I think the Civil Court's jurisdiction will be affected.

The legal position in the matter has been examined at length by a Division Bench of this Court in Sankar Kumar Bhattar v. Tahasildar-Revenue Officer, Basta and Ors. O.J.Cs. 1322 to 1330, 1332 to 1339 and 1341 to 1343 of 1974 dd. on 21-10-1975. It has been held:

... the meaning of the expression to entertain any suit in Section 67 would be to receive and to deal with it or to admit it to consideration, and the process of entertaining would continue until the suit is finally determined. The net result would be that the Court of the Sub-Judge would lose the further jurisdiction to decide the question of existence of relationship of landlord and tenant between the Petitioners and the opposite parties after coming into force of the president's Act 17 of 1973.

But in the present case, there had already been a finding that Defendant No. 1 is not a tenant within the definition of the Act. The right to make an application u/s 36-A of the Act has been given by the statute to a tenant and not to a trespasser. The decrees already passed cannot be superseded or vacated on account of introduction of Section 36-A of the Act to the extent that a binding decree declaring the Defendant No. 1 to be trespasser would stand ignored. At the instance of the Defendant No. 1 the application u/s 36-A of the Act, in view of the adjudication that he is a trespasser, was not maintainable. Therefore, there is no force in Mr. Pal's contention that the decrees in the Court below should stand vacated or wiped out and the dispute must be left to be adjudicated by the Revenue Officer.

9. Accordingly the contention of Mr. Pal raised on the additional evidence must be

rejected and in view of the concurrent findings of the Courts below on the other aspects, the second appeal must stand dismissed. I direct parties to bear their own costs throughout.