
(1995) 03 OHC CK 0016
In the Orissa High Court
Case No : First Appeal No. 223 of 1983

Dinabandhu Behera and Others	Vs	APPELLANT
Kalandi Charan Mishra and Another		RESPONDENT

Date of Decision : 22-03-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, 96

Citation : AIR 1995 Ori 237

Hon'ble Judges : R.K. Patra, J

Bench : Single Bench

Advocate : S. Kr. Mohanty and S.K.A. Mohanty, for the Appellant; S. Misra-2, R.C. Rath and S. Mohanty, P.K. Patnaik, H.H. Kar and N. Kanungo, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Patra, J.—Defendants 1 to 5, the legal representatives of deceased defendant No. 6 and defendants 7 to 25 have filed this appeal against the judgment and decree of the learned Subordinate Judge, Athgarh declaring plaintiff respondent No. 1's right, title interest and possession in respect of the suit land, permanently restraining the appellants as well as defendant No. 26-respondent No. 2 from going upon the land or from interfering with the possession and enjoyment of respondent No. 1 and declaring entitlement of respondent No. 1's right to get the seized paddy valued at Rs. 1000/- in G. R. Case No. 88 of 1972.

2, The case of respondent No. 1 hereinafter referred to as "the plaintiff is that he is the owner in possession of the suit land comprising of an area of Ac. 1.60 decimals out of total area of Ac. 20.50 decimals under plot No. 460 appertaining to khata No. 4 situated in mouza Deuli. According to him, in a proceeding in O. L. R. Case No. 98 of 1976 u/s 36-A of the Orissa Land Reforms Act, 1960, he was granted certificate in respect of the suit land by the order of the Revenue Officer dated 24-12-1977. Pursuant to the said order, he duly paid the compensation

amount to the respondent No. 2 who was a party to the said O. L. R. case and under whom he was a bhag tenant prior to the initiation of the proceedings. The State Government have also recognised him as a raiyat in respect of the suit land. Although the defendants had no semblance of right, title, interest and / or possession over the suit land, they created trouble in his enjoyment and possession over the suit land. Due to such mischief committed by the defendants, on the basis of report submitted by the plaintiff, G. R. Case No. 88 of 1977 was initiated against the defendants. The said case, however, ended in acquittal. Being emboldened by the order of acquittal, they again started troubling him in the enjoyment and possession of the suit land. In the premises, the plaintiff filed the suit claiming aforesaid reliefs.

Defendants 1 to 25 filed joint written statement totally denying the allegations made by the plaintiff. Their case is that the suit land originally belonged to the ex-ruler of Baramba. Suit land was ceiling surplus land which consequently vested in the Government and they are in possession of the same. Defendant No. 26 (respondent No. 2) did not choose to contest the suit as a result of which he was set ex parte.

On behalf of the plaintiff, six witnesses were examined in support of his case. The contesting defendants examined two witnesses on their behalf. Both parties filed number of documents in support of their respective stand. On the basis of the evidence adduced in the case, the learned trial Judge decreed the suit holding the plaintiffs right, title and interest in respect of the suit land. He has also held that the defendants are not at all in possession of the suit land.

3. On 7-11-1988 a memo was filed on behalf of the plaintiff saying that on account of the death of appellants 1, 15, 16, 19 and 24 "during the period from 1984 to 1986, this appeal has abated as a whole, the decree being joint and indivisible. This Court on 14-12-1988 passed order on the said memo observing that it would be considered at the time of hearing of the appeal.

4. When this appeal was taken up for hearing, Shri Mohanty, learned counsel for the appellants, submitted that the appeal does not abate as a whole, inasmuch as the appellants were alleged to have been in possession of specific portion of the suit land. In support of this contention, he drew my attention to paragraph 13 of the plaint wherein the plaintiff has referred to some O.L.R. cases in which certain specified defendants were shown as parties. According to the learned counsel, mention of different defendants in respect of different cases would show that the allegation of the plaintiff is specific against those defendants in respect of specific portion of the suit land. He also faintly submitted that in any case there is substantial representation for the deceased appellants and, as such, the appeal cannot be held to have abated as a whole.

5. It is an admitted position that appellants 1, 15, 16, 19 and 24 have died during the pendency of this appeal and their legal representatives have not been brought on record. As such, the appeal, so far as the aforesaid deceased

appellants are concerned, stands abated. But what is the effect of the said abatement in respect of the surviving appellants? Does the appeal abate as a whole or there is partial abatement? In order to determine this question, we have to look at the averments made by the plaintiff in the plaint and the decree obtained by him in the suit.

6. The plaintiff filed the suit for declaration of his right, title, interest and possession and for permanent injunction against all the defendants. The plaintiff did not lay specific claim separately against any of the defendants over the suit land. On the other hand, according to the plaintiff, the defendants were joint tortfeasors. The defendants in their joint written statement denied the claim of the plaintiff in entirety. No separate claim was laid by any of the defendants in the joint written statement, The averments in paragraph 13 of the plaint referred to by Shri Mohanty do not indicate that the plaintiff had made any reference to specific portion of the suit land. As a matter of fact, in col. 4 of the table appended to paragraph 13 of the plaint, the plaintiff described the disputed land as "Ac. 1,50 decimals out of area Ac. 29.50 decimals without specification and boundary". In the circumstances, it cannot be held that the plaintiff had made any separate or specific allegation in respect of any of the defendants with regard to the suit land nor did any of the defendants claim right, title or possession in respect of any specific portion of the suit land. The decree under appeal is joint and indivisible. Success of the appeal may lead to the Court's coming to a decision which would be in conflict with the decision between the surviving defendants and the deceased defendants. This would result in conflicting and contradictory decrees with respect to the same subject-matter between the deceased defendants and the surviving defendants. As the decree under appeal cannot be split up, the appeal has to be held to have abated in toto.

7. The question as to when can the principles of substantial representation be invoked came up for consideration before this Court in *Brahmananda Majhi v. Gopal Padhan* 1975 CLT 760 . Justice R. N. Misra (as he then was) after referring to the judgments of the, Supreme Court in *Dolai Molliko and Others Vs. Krushna Chandra Patnaik and Others*, and *Daya Ram and Others Vs. Shyam Sundari*, held as follows:

"Thus the legal requirement seems to be that all legal representatives should be brought on record. The only exception is in the case where notwithstanding the bona fide and legitimate enquiries or on account of some bona fide doubts a few of the legal representatives are left out and thus those on the record are said to represent the estate appropriately; in such cases there may not be any abatement."

Present is not a case in which substitution was made in respect of the deceased defendants 1, 15, 16, 19 and 24 but some of their legal representatives were left out bona fide. It is a case where there is no substitution at all in respect of the aforesaid deceased appellants. For the aforementioned reason, the question of invoking the principle of substantial representation does not arise.

8. The consequence is that the appeal abates in toto which is accordingly dismissed. There shall be no order as to costs.