
(1981) 07 OHC CK 0006

In the Orissa High Court

Case No : Second Appeal No. 155 of 1979 and Civil Revision No. 331 of 1979

Gangadhar Prasad Ray

APPELLANT

Vs

Nabakrushna Mohanty and Others

RESPONDENT

Date of Decision : 28-07-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 2, Order 21 Rule 2, Order 9 Rule 13
Limitation Act, 1908 — Article 174
Limitation Act, 1963 — Article 125

Citation : (1981) 52 CLT 306

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

Bench : Single Bench

Advocate : P. Kar, for the Appellant; S. Mohanty and S.D. Das, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, C.J.—Plaintiff who is in appeal against the confirming decree of the lower appellate Court had sued for title, confirmation of possession, declaration that the ex parte decree in Title Suit No. 179 of 1966 against him in regard to the disputed property was not operative and for permanent injunction restraining Defendants 1 to 4 from executing the earlier decree against him. He filed the suit on 3-4-1972 on the allegation that Madhusudan Mohanty, father of Defendants 1 to 4 had been recorded as occupancy tenant in respect of plot No. 3357 with an area of 20 decimals. Father of Defendants 6 and 7 and husband of Defendant No. 5 - one Mani Barik and his brother Chinta had acquired the said land from the occupancy raiyat under a permanent lease deed. Though Mani and Chinta were occupancy raiyats, the record indicated sikimi tenancy in their favour in the C.S. Mani and Chinta had their residential house on the adjacent plot No. 3256 and they were possessing the disputed property as an extension of their homestead. Chinta sold his half share to Baban and Baban in his turn sold it to Defendant No. 12. Mani sold a part of his 10 decimals to Defendant No. 12 Defendants 8 to 11. After his death, Defendants 5 to 7 who were the successors of Mani sold the

remaining property to the Plaintiff under a registered sale deed dated 28-5-1965 for a consideration of Rs. 300/- (Ext-2). Plaintiff constructed a house over the property and continued to live therein. It was further pleaded that there was custom of transferability and heritability of sikimi tenancy in the locality. Defendants 1 to 4 filed Title Suit No. 179 of 1966 impleading the Plaintiff and Defendants 5 to 12 on the ground that sikimi tenancy was neither heritable nor transferable and therefore, the sale deeds executed by Defendants 5 to 7 and by Chinta and Mani were invalid and in-operative. They had, therefore, prayed for declaration of title and eviction of the present Plaintiff and Defendants 8 to 12 as also for recovery of possession of the property. The present Plaintiff was Defendant No. 8 in the earlier suit. The present Defendants 5 to 7 were Defendants 1 to 3 therein and Defendants 8 to 12 were Defendants 4, 5, 6, 7 and 9 respectively. The suit was compromised between the parties and as per its terms the Plaintiffs' title was to be upheld. The certified copy of the petition of compromise has been marked as Ext. 1 in the present suit. The petition of compromise was duly written and signed by the parties as also their advocates on 15-1-1969, but for some reason the same could not be presented in Court. The suit was posted to 12-2-1969 when petition was filed but it could not be recorded as the presiding officer was on leave. The first Plaintiff in the earlier suit (present Defendant No. 1) told the present Plaintiff that he need not come again as the compromise would be recorded and relying upon such representation, the Plaintiff did not take any further steps. As parties did not appear the petition of compromise was rejected and the suit was decreed ex parte ultimately on 8-8-1969. Plaintiff came to know of the ex parte decree on 1-1-1970 and filed an application for setting aside the ex parte decree under Order 9, Rule 13, Code of Civil Procedure. The petition was rejected. An appeal filed against the order of rejection was also dismissed. Thereafter the present suit was filed when the ex parte decree was put into execution.

Defendants while accepting that there was a compromise pleaded that Rs. 300/- was to be paid to them but on the date when the compromise was to be recorded the Plaintiff did not appear with the money and, therefore, the compromise could not be recorded. They supported the ex parte decree. Defendants 8, 9 and 12(ka) in a separate written statement supported Defendants 1 to 4.

Both the Courts below have dismissed the Plaintiffs suit. That is how the present second appeal has been filed against the affirming decree of the lower appellate Court.

2. The connected civil revision is also between the same parties and is directed against the appellate judgment of the Subordinate Judge of Bhadrak arising out of a proceeding under Order 21, Rule 2, Code of Civil Procedure. During the pendency of Title Suit No. 26 of 1972 out of which the second appeal arises, a fresh compromise was entered into between the parties and the compromise petition was filed on 2-12-1975. On that day by order No. 67 in the present suit, the learned Munsif directed:

Plaintiff and Defendants 1 and 4 file a compromise petition. Defendant No. 1 who is present and Advocates for Defendant No. 4 do not admit the terms of compromise. Hence the compromise petition is rejected....

As it appears, the petition of compromise was not signed by Defendants 2 and 3. Plaintiff did not take steps to challenge the order dated 2-12-1975 and participated in the trial of the suit without pressing for accepting the compromise. On 3-4-1976, he filed an application under Order 21, Rule 2, CPC for recording satisfaction of the decree in Title Suit No. 179 of 1966. The application was registered as Miscellaneous Case No. 76 of 1976. By order dated 14-2-1977, the learned Munsif rejected the application holding that the compromise petition filed in Title Suit No. 26 of 1972 was not a valid agreement made out of Court to adjust the ex parte decree in between the parties concerned. An appeal was filed against the order of the learned Munsif and the same having been dismissed, this civil revision has been filed.

3. Both the matters were heard together and the same shall be disposed of by this common judgment. Admittedly, there has been an ex parte decree against the Plaintiff in the earlier title suit and unless the ex parte decree is liable to be vacated, Plaintiff is not entitled to maintain the present action for declaration of his title because under the earlier decree, he had lost it. The Courts below have recorded a finding that the compromise though genuine had to be recorded after consideration money was paid. The Plaintiff failed to appear in the earlier suit and, therefore, the compromise was not recorded and ultimately the ex parte decree followed. Fraud flowing out of misrepresentation by the Defendants who were Plaintiffs in the earlier suit has not been established. That being the position, the second appeal has no merit at all Plaintiff has been rightly found to have been bound by the earlier decree. The second appeal accordingly dismissed.

4. I shall now proceed to deal with the civil revision. The ex parte decree in Title Suit No. 179 of 1966 was passed on 8-8-1969. Plaintiff admitted in his suit that he came to know of the ex parte decree in 1970. As already pointed out, Plaintiffs own suit is of 1972 where he asked for setting aside the ex parte decree. He applied on 3-4-1976 under Order 1, Rule 2 of the CPC for recording adjustment or satisfaction of the decree on the basis of the second petition of compromise of December, 1975. The application for adjustment was filed in Court more than thirty days after payment was made. Article 125 of the Limitation Act of 1963 is applicable. That Article provides a period of thirty days from the date when payment or adjustment is made for making the application. This Court held in the case of Dhani Behera (J. Dr.) Vs. Sushil Chandra Palit (D. Hr.), that an application under Order 21, Rule 2, CPC was governed by Article 174 of the old Limitation Act of 1908 and by Article 125 of the new Limitation Act of 1963. That being the position, the application dated 3-4-1976 to record adjustment on the basis of the compromise of December, 1975 is certainly out of time. Since the application was barred by limitation the Courts below should not have gone into the merit of the matter. This aspect has been completely lost

sight of. The civil revision accordingly fails as having no substance.
Both parties are directed to bear their own costs throughout.