

(1982) 10 OHC CK 0005

In the Orissa High Court

Case No : Original Jurdn. Case No. 1372 of 1978

Gopinath Deb

APPELLANT

Vs

Budhia Swain and Others

RESPONDENT

Date of Decision : 06-10-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Orissa Estates Abolition Act, 1951 — Section 38A, 6, 7, 8A, 8A(2)

Citation : AIR 1983 Ori 31 : (1982) 54 CLT 515

Hon'ble Judges : P.K. Mohanti, J;B.N. Misra, J

Bench : Division Bench

Advocate : G. Rath, Deepak Misra and Ashok Misra, for the Appellant; L. Rath, B.S. Misra and Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanti, J.—The petitioner is a deity enshrined at village Biswanathpur, P.S. Satyabadi in the district of Puri, It seeks issuance of a writ of certiorari quashing the order dated 2-2-78 (Annexure 1) and the order dated 2-6-78 (Annexure 2) passed by "the Estate Abolition Collector (opposite party No. 14) and the Additional District Magistrate (Land Records), Puri (opposite party No. 15) respectively.

2. On an application filed by the petitioner under Sections 6 and 7 of the Orissa Estates Abolition Act, opposite party No. 14 by his order dated 2-4-66 passed an order of settlement in favour of the petitioner in respect of the lands covered by khata Nos. 431 and 438 of village Biswanathpur. The rent schedule was accordingly issued and rent was realised from the date of settlement. No appeal was filed u/s 9 of the O.E.A. Act and the order became final. On 24-7-74 opposite party Nos. 1 to 12 who are residents of village Panibhandar. P. S. Satyabadi district Puri filed an application for review of the order of settlement dated 2-4-66 on the sole ground that the public notice of the claim had not been served at the locality in accordance with the manner prescribed by law. Opposite

party No. 14, in the purported exercise of the powers u/s 151, C.P.C. reviewed the order of settlement on 27-9-74 and by his final order dated 2-2-76 directed that the lands should be recorded in the Anabadi Khata of the village and should not be settled in the name of the ex-intermediary.

3. The petitioner preferred an appeal against the order dated 2-2-76 which was passed after review. The appeal was registered as O.E.A. Appeal No. 5/76. O.P. No. 15 allowed the appeal, set aside the order in Annexure 1 and remanded the case to O.P. No. 14 for a fresh disposal in accordance with the lease principles. He found that there was no express power of review conferred on the O.E.A. Collector under the O.E.A. Act; but the action of O.P. No. 14 in passing the order dated 2-2-76 could be interpreted as a case of recalling an order which, on account of failure to follow the mandatory provisions of Section 8-A (2) of the Act, was a nullity. He also found that the petition under Sections 6 and 7 of the Act was not maintainable as the same was not filed within the prescribed period of limitation. He further found that the petitioner Gopinath Deb not being the ex-intermediary the application under Sections 6 and 7 of the Act was not entertainable.

4. The petitioner's contention is that the order dated 2-2-76 passed On review was without jurisdiction and that the question whether the earlier order dated 2-4-66 was a nullity could not be gone into by O.P. No. 14 except by way of a review. It is also contended that the opposite party No. 15 went wrong in deciding the question of limitation as such a question was not raised in the application for review. It is further contended that the view taken by O.P. No. 15 that the order of settlement was a nullity is unfounded.

5. The stand taken by the opposite parties is that the O.E.A. Collector had no initial jurisdiction to enter upon the enquiry regarding the settlement of the land since the application under Sections 6 and 7 was made beyond time and the right to make such an application had been extinguished. It is also contended that the mandatory provisions of Section 8-A (2), first proviso, not having been complied with the order of settlement was a nullity and could be ignored even though there was no express power of review.

6. In this writ application we are not called upon to examine the validity of the order of settlement dated 2-4-66. The questions that arise for consideration are:--

(i) Whether the opp. party No. 14 could review his earlier order dated 2-4-66 by invoking the powers u/s 151, C. P. Code?

(2) Whether the opp. party No. 14 could recall or ignore the order dated 2-4-66 treating the same to be a nullity?

7. The term "review" means a judicial re-examination of the case in certain specified and prescribed circumstances. The power of review is not inherent in a Court or Tribunal. It is creature of the statute. A Court or Tribunal cannot review

its own decision unless it is permitted to do so by statute. The Courts having general jurisdiction like Civil Courts have inherent power. But the Courts or Tribunal of limited jurisdiction created under special statutes have no inherent power--vide *State of Orissa Vs. Member, Sales Tax Tribunal and Another*, . The learned O. E. A. Collector (O. P. No. 14) could not exercise inherent powers u/s 151, C. P. Code to review his own order.

Section 38-A of the Orissa Estates Abolition Act which was inserted by Act 21 of 1973 came into force on 2-10-1973. The application for review was filed on 23-7-74. Section 38-A authorises the O. E. A. Collector to review his decision or order within one year from the dates of the decision or order on the ground that there has been a clerical or arithmetical mistake in the course of any proceeding under the Act. None of the grounds on which the O. E. A. Collector may exercise the power of review u/s 38-A exists in the present case. He could not review his order on the grounds not falling, within the ambit of Section 38-A. Moreover the power of review could not be exercised after expiry of the period of one year prescribed by Section 38-A."

8. The next question for consideration is whether the order dated 2-4-66 could be recalled or ignored on the ground that it was a nullity. It is well settled that if a decree or an order is apparently a nullity it can be ignored. In *Kiran Singh and Others Vs. Chaman Paswan and Others*, their Lordships observed:-- (at p. 342)

".....It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings....."

In the present case, the contention is that the order dated 2-4-66 was a nullity as the Estate Abolition Collector lacked inherent jurisdiction to entertain an application under Sections 6 and 7 of the Act after expiry of the period of limitation.

9. Inherent lack of jurisdiction means a power or jurisdiction which does not at all exist or vest in a Court. To put it otherwise, a Court can be said to lack inherent jurisdiction when the subject-matter before it is wholly foreign to its ambit and is totally unconnected with its recognised jurisdiction. Competence of a Court to try a case goes to the very root of jurisdiction and where it is lacking, it is a case of inherent lack of jurisdiction. For example, if a suit for declaration of title has been filed in a criminal Court, all proceedings relating thereto in that Court are null and void. In this connection, we may usefully refer to the case of *Seth Hiralal Patni Vs. Sri Kali Nath*, where it was observed as follows:-- (at p. 200)

".....The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seisin of the case because the subject-matter was wholly foreign to its jurisdiction Or that the defendant was

dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject-matter of the suit or over the parties to it....."

10. If a Court or Tribunal has power to entertain cases of a particular category or nature, then it cannot be said that cases belonging to that category or nature are totally foreign to its jurisdiction. In the present case, the opp. party No. 14 had jurisdiction to entertain and decide applications under Sections 6 and 7 of the Act in respect of the subject-matter of the dispute. It cannot be said that he could not have seisin of the case when the subject-matter belongs to the nature of its jurisdiction.

11. Assuming that the O. E. A. Collector should not have entertained the claim under Sections 6 and 7 of the Act on the ground of bar of limitation, we are clearly of the opinion that the order of settlement was not a nullity inasmuch as he was competent as regards the nature of the claim to exercise jurisdiction.

In the review application the opposite parties 1 to 12 did not raise any objection that the application under Sections 6 and 7 was barred by limitation. The O. E. A. Collector while granting the review did not also record a finding that the application was barred by limitation. The question was for the first time raised before the appellate authority. It was, however, contended by the petitioner before the appellate authority that the application was filed in time; but it was kept pending till 30-10-63. The appellate authority however found that the application was barred by limitation. On the basis of that finding it is urged in this writ application that the claim under Sections 6 and 7 of the Act having filed beyond the period of limitation, the order of settlement is without jurisdiction. We are unable to accede to this contention. The decision on the question of limitation is taken only after the Court or Tribunal has embarked upon an enquiry. If a decision is taken in a suit or proceeding which is barred by time it is not a nullity. It is an illegality committed in course of exercise of jurisdiction and can only be remedied by an appellate or revisional authority. In *Ittavira Mathai Vs. Varkey Varkey and Another*, their Lordships laid down as follows (at p. 910):--

"..... Even assuming that the suit was barred by time, it is difficult to appreciate the contention of learned counsel that the decree can be treated as a nullity and ignored in subsequent litigation. If the suit was barred by time and yet, the court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have

jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities....."

In view of the above pronouncement of their Lordships of the Supreme Court there is no substance in the contention that the order of settlement was a nullity merely because the application under Sections 6 and 7 was made beyond the period of limitation.

12. The next contention is that the public notice of the claim not having been given as required by the first proviso to Sub-section (2) of Section 8-A of the Act the order of settlement dated 2-4-66 is without Jurisdiction. Reliance is placed on a decision of this Court in the case of Baikuntha Das v. Sm. Sabitri Devi (1971) 2 CWR 326. That decision was rendered in a certiorari proceeding under Article 226 of the Constitution carried from a decision of the Tribunal under the Orissa Estates Abolition Act. It was laid down in that decision that the provision of Section 8-A (2), first proviso, is mandatory and it is not open to the Collector to omit any process of publication. It was further held that if all the requirements of Section 8-A (2) are not fulfilled, the Collector cannot proceed further. That decision was considered by a Full Bench in the case of Krupasindhu Misra and Another Vs. Gobinda Chandra Misra and Others, and it was held that the requirement of the notice stipulated in the proviso is in conformity with the natural justice and is a mandatory one. But the manner and form of notice are directory. If the requirement of the proviso has been substantially complied with the order of settlement would not call for any interference.

In the review application dated 27-7-74 the opp. parties 1 to 12 challenged the order of settlement on the sole ground that notice had not been served at the locality in accordance with the manner prescribed by law. They did not plead non-service of the notice but raised objection only with regard to the manner of service of the notice. The Estate Abolition Collector (O. P. No. 14) while granting review as per his order dated 27-9-74 observed as follows:--

"Advocate for petitioner present. O. P. the claimant present and filed hazra. Heard the Advocate. He states that the proclamation has not been properly done in accordance with the law. The order-sheet does not disclose the manner of service of proclamation. As per the recent decision of the Honourable High Court of Orissa, the proclamation of the case has not been served properly. Hence the case is reviewed u/s 151, C. P. C."

Merely because the manner of service of the notice has not been mentioned in the order-sheet no presumption can be drawn that there was no proper service of the notice. On a reference to the records of the Estate Abolition Collector, it appears that, the notice was duly issued on 15-12-63 inviting public objection. The notice is available on the record, but some of its pages are missing. It appears from the order-sheet of the record that some objections were filed before the Estate Abolition Collector and the Advocate for the objectors argued that the service of public notice had not been duly made. After hearing the

counsel for the parties, the Estate Abolition Collector in his order dated 23-2-66 observed as follows:--

"It is only due to missing of some pages of the proclamation including the last page over which the report of the process-server was there, a scope was available to the objectors to file this petition. Under the above circumstances, it is not necessary to issue another proclamation and entertain further objection since the case is being heard and going to be finalised on 14-3-66."

Thus, it will be seen that there was neither any allegation by the opposite parties 1 to 12 nor there was any finding by the O. E. A. Collector that the provisions of Section 8-A (2), first proviso, were not duly complied with, The onus was on the opposite parties 1 to 12 to prove non-compliance with the provisions. No evidence was adduced by them to show that there was no proclamation at the locality. In the Full Bench decision in *Krupasindhu Misra and Another Vs. Gobinda Chandra Misra and Others*, it was held that placing the burden On the successful party to prove the settlement upon a bare denial of the adversary is a proposition not supported by law. In the absence of any evidence to the contrary, the normal inference would be that the procedure prescribed by law was duly followed in making the settlement under Sections 6 and 7 of the Act.

13. In the appeal which was preferred against the order dated 2-2-76. O P. No. 15 held that chough the O. P. No. 14 had no power of review yet his action could be interpreted as a case of recalling the order which on account of failure to follow the mandatory provisions of Section 8-A (2) was rendered a nullity. For this proposition he relied on the decision reported in (1971) 2 CWR 326 (supra). The question raised in that case was whether the Collector had jurisdiction to recall his own order on the principle of *ex debito justitiae* and the power can be viewed as equivalent to the ordinary power of review. The Court in para 14 of the judgment held that ft was not necessary to deal with this contention and the question was left open. As we have indicated earlier the page containing the service return of the proclamation was missing from the record. No evidence was adduced to show that there was no proclamation of the public notice at the locality. The objection was raised only with regard to the manner of service of proclamation and the forums below did not record a finding as to whether there was substantial compliance with the proviso to Section 8-A (2). In the absence of any material on the record it is futile to contend that the order of settlement was a nullity.

14. The next contention is that the petitioner deity was not an ex intermediary in respect of Khata No. 431 so as to be entitled to make an application for settlement and that the character of some of the plots of land was not such, as could have been settled under Sections 6 and 7 of the Act. No such contention was raised in the application for review. The Estate Abolition Collector (O. P. No. 14) did not also take such a ground for granting review. The question whether the order of settlement is correct or valid in law does not arise for consideration in the present writ application. It appears however that the lands appertaining to

khata No. 431 were settled with another deity named Khetrapala Thakurani. Be that as it may, where a Tribunal has jurisdiction to decide a matter, it does not lose its jurisdiction by passing its decision upon an incorrect determination of any question of fact or law. The decision must be regarded as valid so long as it is not set aside or declared invalid by a court of competent jurisdiction. The order of settlement dated 2-4-66 was not reversed by appeal or revision. The power of review u/s 38-A of the O. E. A. Act and the inherent power u/s 151 C. P. C. were not available to be exercised. The Tribunal could not thereafter recall or ignore its own order.

15. In the premises aforesaid, the writ application be allowed and the orders in Annexures 1 and 2 be quashed. In the circumstances of the case, we do not make any order as to costs.

B. N. Misra, J. :-- I agree.