

(1983) 11 OHC CK 0002

In the Orissa High Court

Case No : Civil Revision No. 666 of 1980

Indrajit Dandasena and Others

APPELLANT

Vs

Mangal Charan Dandasena and Others

RESPONDENT

Date of Decision : 26-11-1983

Acts Referred:

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

Citation : (1984) 57 CLT 31

Hon'ble Judges : P.C. Misra, J;J.K. Mohanty, J

Bench : Division Bench

Advocate : S.C. Mohapatra, for the Appellant; P.K. Mishra, L. Mohapatra, A.S.C. and A.G., for the Respondent

Final Decision : Allowed

Judgement

P.C. Misra, J.—The Petitioner in this revision filed an application in the Court of the Subordinate Judge, Sonapur in Title Suit No. 5 of 1980 praying therein to be impleaded as parties to the suit. The learned Subordinate Judge refused to implead them as parties to the suit and held that they were neither necessary nor proper parties and came to the ultimate conclusion that their application under Order 1, Rule 10(2) of the CPC (for short "the Code") was not maintainable.

2. The learned Single Judge before whom this revision came up for hearing has observed that there are divergent authorities of this Court on the point whether the Court should allow a party to be added when the Plaintiff does not make such person as party in the suit and there being no uniformity of decision on this question, he has referred the matter to a larger Bench for decision.

3. The Plaintiffs have filed the aforesaid suit in the Court of the learned Subordinate Judge, Sonapur, for a declaration that the Tahasildar had no jurisdiction to correct the finally published record-of-rights and for permanent injunction against the Defendants from interfering with the possession and

enjoyment of the Plaintiffs in respect of the suit properties. The facts leading to the aforesaid prayer by the Plaintiffs as alleged in the plaint are as follows:

The suit land comprises some properties situated in village, Sannuapali within Dungalipali P.S. and it is a tank. It was excavated by one Dukhiram Gauntia who was the ancestor of the Plaintiffs and it stands so recorded during the third settlement in the ex-State of Sonapur. According to the Plaintiffs, during the fourth settlement the suit properties were recorded in the name of Plaintiff No. 1 and others, successors of Dukhiram Guntia, and they have absolute title and position over this land. The Tahasildar has illegally corrected the finally published record-of-rights ignoring the title of the Plaintiffs though the State Government. It has no right whatever to the suit properties. Taking advantage of the correction of the record-at-rights by the Tahasildar, the Defendant-State has been creating disturbances in the enjoyment of the suit properties by the Plaintiffs which is the cause of action for the suit. The State of Orissa is the sole Defendant in the suit against which the aforesaid reliefs have been prayed for.

4. The State of Orissa has filed the written statement denying the plaint allegations. It is alleged in the written statement that the suit land appertained to Rakhit Anabadi Khata No. 3 and the Plaintiffs have never been in possession thereof. 5. During the pendency of the suit, an application was filed by the present Petitioners praying to be impleaded as Defendants in the suit on the allegation that the suit tank is a public tank and the Petitioners as well as other villagers have been using the water of the suit tank for irrigation, bathing, et cetera in their own rights. They further alleged that they had filed a case before the Board of Revenue and it was on their move that the Board of Revenue directed correction of the record-of-rights. According to them, this move of the Plaintiffs in filing a suit against the State of Orissa alone without impleading them as parties to the suit is mala fide and the ultimate purpose is to defeat the claim of the villagers to the suit tank and grab the properties in their private capacity.

6. The learned Subordinate Judge after hearing parties has come to the conclusion that since the Plaintiffs do not claim any relief against the present Petitioners, the latter are neither necessary nor proper parties to the suit. In the course of his orders, he has observed that the suit properties are admitted by the Plaintiffs to be belonging to the State Government for which the plea of private ownership as apprehended by the Petitioners is without any basis. He has come to the conclusion that the application under Order 1, Rule 10(2) of the Code is not maintainable in the facts and circumstances of the case and has accordingly rejected the same.

7. The questions that arise for consideration in this revision application are:

(i) Whether the present Petitioners are necessary or proper parties to the suit under Order 1, Rule 10(2) of the Code and

(ii) Whether the Court can allow a party to be added as a Defendant against the wishes of the Plaintiffs who have got the choice of choosing the parties against

whom they seek relief?

We shall deal with the aforesaid questions seriatim.

8. Order 1, Rule 10(2) of the Code is quoted below for ready reference:

The Court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party in properly joined whether as Plaintiff or Defendant, struck out that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to be adjudicate upon and settle all the questions involved in the suit, be added.

The distinction between a "necessary party" and a "proper party" is well known. "Necessary parties" are those in whose absence no effective decree at all can be passed, whereas "proper parties" are those whose presence is necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. The facts narrated above would show that the present Petitioners cannot be termed as necessary parties. The Plaintiffs' only grievance in the suit, as it appears from the allegations made in the plaint, is that the authority concerned has corrected the record-of-rights ignoring their title and possession over the suit land and their prayer is for permanent injunction against the State and its officers not to interfere with the peaceful possession and enjoyment of the suit tank by the Plaintiffs. Therefore, even if the Petitioners are not added as parties, the court can pass an effective decree which would be capable of execution against the State of Orissa. Applying the aforesaid test, the present Petitioners, in our opinion are not necessary parties to the suit.

Therefore, it has to be next considered as to whether they are proper parties to the litigation. Admittedly, the Plaintiffs have claimed exclusive title to the suit properties. Their case as stated in the plaint is that the suit tank was excavated by their ancestor and stood recorded in the names of the members of their family in the successive record-of-rights. The record-of-rights has now been corrected by the Tahasildar describing the State to be the owner of the suit tank ignoring the title of the Plaintiffs. Therefore, it is not correct to say, as observed by the learned Subordinate Judge in the impugned order that the suit tank is admitted by the Plaintiffs to belonging to the State. According to the present Petitioners, the suit tank is a public one in which the villagers as also the Petitioners have right of irrigation, bathing et cetera. In other words the ownership and exclusive enjoyment of the suit tank by the Plaintiffs has been disputed by the Petitioners in their application to be impleaded as parties to the suit. Thus the Petitioners are interested in the result of the suit. It is not necessary that any relief should be asked by the Plaintiffs against the persons sought to be impleaded. The object of adding parties under Order 1, Rule 10(2) of the Code is to avoid multiplicity of suit and the rule authorises the Court to add a party even for the purpose of final determination of the questions involved

in the suit as between a party on the record and the party sought to be added. As already stated, one of the primary question that arises for determination in this suit is as to whether the Plaintiffs have exclusive title and possession in respect of the suit properties and the decision of the said issue would directly affect the present Petitioners in as much as they claim certain rights in the suit tank. Ownership is a bundle of rights and the cases made out by the Plaintiffs that they are the exclusive owner is not consistent with the allegations made in the application under Order 1, Rule 10(2) of the Code. Therefore, the question whether the suit tank is a private one belonging to the Plaintiffs or a public tank which all the villagers are entitled to enjoy is a question that arises for consideration of the Court. The prayer made by the Plaintiffs in the suit ignores the alleged claim of the present Petitioners. The exclusive enjoyment by the Plaintiffs being a question involved in the suit, the presence of the present Petitioners would enable the Court effectually and completely to adjudicate upon the said issue. Thus, the Petitioners are proper parties to the suit for which the Court can direct their implemenation under Order 1, Rule 10(2) of the Code.

9. It has been argued at length that all questions involved in the suit are confined to the parties to the litigation and would not include questions which arise for consideration as between the parties and a third party seeking to be impleaded. The decision in the case of *Khushi Ram v. Lal Man and Ors.* AIR 1983 Del 78 was relied upon for that purpose. The suit out of which the aforesaid decision arises was filed by the Plaintiff for restraining the Defendants from interfering with his possession of a plot of land. The question of title was not in issue. There was no application by the Plaintiff in the plaint that the "Gaon Sabha" was interfering with his possession. There was also no question of causing any prejudice to the "Gaon Sabha" if any relief was granted to the Plaintiff. The questions involved in the suit as to existence of the plot of land, possession of it by the Plaintiff and the alleged interference with the Plaintiff's possession by the Defendant could be decided without the presence of the "Gaon Sabha". Therein, the learned Judge held that the judgment in the injunction suit not being a judgment in rem would not be binding on the "Gaon Sabha" which was not a party to the suit. In these circumstances, the prayer for implemenation of party was refused on the basis that the "Gaon Sabha" was neither a necessary nor a proper party to the suit. In course of discussion of the principle of Order 1, Rule 10(2) of the Code, the learned Judge observed that the questions involved in the suit within the meaning of the said rule were confined to the questions concerning the parties to the suit and not the questions concerning the third party. There are a series of decisions of this Court holding that the said clause questions involved in the suit occurring in Order 1, Rule 10(2) of the Code should not be given a restricted interpretation and should be construed in a wider sense so as to include questions that may arise concerning a third party. This Court in the case of *Damodar Mohapatra and Anr. v. State of Orissa and Ors.* 34 (1968) C.L.T. 956, following the decision in the case of *Vydianadayyan v. Sitaramayyan* ILR Mad. 52, observed that to accept a restricted interpretation involves addition

of words which were not there in the rule, namely between the parties to the suit." The following passage quoted from *Vyidianadayyan v. Sitaramayyan* ILR Mad. 52 in *Damodar Mahapatra's* case 34 (1968) C.L.T. 956, would clarify the position:

...To accept the more restricted interpretation involves the addition of words which we do not find in the section (Rule), namely, between the parties to the suit and there can be few, if any, questions which cannot be determined between the parties to the suit one way or the other and of which the determination, if they be material will, as between the parties to the suit not be final. On the other band, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and end to litigation respecting them....

A large number of decisions have been referred to and discussed in the said judgment for the purpose of indicating that the object of the provision of Order 1, Rule 10(2) of the Code shall be defeated if a narrower interpretation is given to the clause "question involved in the suit." The Rules in the Code are intended to avoid multiplicity of suit and to ensure that the dispute may be finally determined in the presence of all the parties interested without delay and expenses instead of leaving the parties to several actions to be started independently. The Rules also intend to avoid a possible conflict of decisions. The aforesaid object cannot be achieved if a narrower interpretation is given to the rule in question.

10. The learned Counsel for the opposite parties relying upon the decision in the case of *Kartik Chandra Mohanty and Anr. v. State of Orissa* and Ors. 34 (1968) C.L.T. 1410, has contended that on similar facts the prayer for Impletion of parties was refused. In the aforesaid case the disputed property was a tank which, the Plaintiffs alleged, belonged to the husband of Defendant No. 3 who died in 1963. The Plaintiffs purchased the disputed tank on 27-6-1966 from Defendant No. 3 after the death of her husband. It was alleged that the tank was situated in the Bari of the Plaintiffs and was not open for use by the public in any manner. The Collector of Puri on 22-2-1962 transferred the disputed tank to a Gram Panchayat. The Plaintiffs in that suit prayed that their occupancy right in the suit tank be declared and their possession in the tank be confirmed. They also asked for permanent injunction against the State of Orissa. The State of Orissa filed a written statement denying the title and possession of the husband of Defendant No. 3 and the Plaintiffs. Some of the villagers filed an application under Order 1, Rule 10(2) of the Code to the effect that the villagers were exercising their right of user over the tank since time immemorial and the matter in contraversion in the suit could not be effectually adjudicated between the Plaintiffs and the Defendants unless the villagers were impleaded as parties. The learned Munsif allowed the application against which decision the Plaintiffs carried a revision to this Court. This Court relying upon a decision in the case of *Narahari Mohanty and Ors. v. Ghanashyam Bal and Ors.* ILR 1963 Cutt. 841,

came to the conclusion that the tests laid down in the said decision were not satisfied by the interveners seeking to be impleaded as parties. The two conditions set out in Narahari Mohanty's case ILR 1963 Cutt. 841 (supra), are not relevant for the purpose of determining whether the party seeking to be impleaded is a proper party or not. In Narahari Mohanty's case ILR 1963 Cutt. 841, this Court held that there must be a right to some relief against the party not joined which means that no decree can be passed without affecting the rights of the absentee-party. Secondly, the presence of the absentee-party should be necessary in order to enable the Court effectually to adjudicate upon and settle all questions involved in the suit. This concept as stated by the Court includes the idea that no decree should be passed by a Court which would be rendered infructuous or would become ultimately inexecutable. In other words, the decision in Narahari Mohanty's case ILR 1963 Cutt. 841 (supra) is not a guide to determine as to who is a proper party. His Lordship appears to have applied the above tests in order to determine as to whether the villagers sought to be impleaded as parties were necessary parties within the meaning of Order I, Rule 10(2) of the Code. Even assuming that the question as to whether the villagers in the facts and circumstances of that case were proper parties considered was the narrower interpretation of Order 1 Rule 10(2) of the Code appears to have been adopted which the learned Judge deprecated in all his other decisions in the cases of Jhampuri Bewa v. State of Orissa and Ors. 32 (1966) C.L.T. 836, a Damodar Mahapatra and Anr. v. State of Orissa and Ors. 34 (1968) C.L.T. 956 (supra) and Daitari Prasad Naik and Ors. v. Umakanta Nayak and Ors. 36 (1970) C.L.T. 1038. In such circumstances, we are not prepared to hold that the villagers who claim user of the suit tank are not proper parties to the present litigation.

It is relevant to refer to a decision of B.K. Patra, J. in Bisi Swain and Ors. v. State of Orissa and Ors. 36 (1970) C.L.T. 131. In that case the Plaintiffs instituted a suit against the State of Orissa praying for a declaration what they had occupancy right over the disputed property and that the order dated 25-7-1967 passed by the Sub-Divisional Officer allowing the claim of some of the villagers that the suit tank was being used for communal purposes was without jurisdiction. Some of the villagers filed an application under Order 1, Rule 10 of the Code claiming that they had been using the water of the tank for bathing and irrigation purposes and their claim had been allowed by the Sub-divisional Officer after necessary enquiry. They contended that they were necessary parties to the suit and should be impleaded as Defendants. The learned Munsif accepted their contention and directed that they be added as Defendants in the suit. In the civil revision filed against the said order of the learned Munsif his Lordship distinguished the question of law laid down in the cases of Narahari Mohanty and Ors. v. Ghanshyam Bal and Ors. ILR 1963 Cutt. 841 (supra), Gagan Behari Patnaik v. Rameswarlal and Ors. 32 (1966) C.L.T. 823 and Kartik Chandra Mohanty and Anr. v. State of Orissa and Ors. 34 (1968) C.L.T. 1410 (supra), and came to the conclusion that the claim of certain rights over the disputed tank by

the villagers having been accepted by some authorities the villagers should be impleaded as parties for complete effectual adjudication of the question involved in the suit. In the present case, the Petitioners in their application have clearly averred that they along with other villagers have been using the tank for irrigation of their lands and for bathing, et cetera. They have further alleged that pursuant to their application filed before the Board of Revenue, The record-of-rights in respect of the suit tank was corrected. Thus, the reasons applied by the learned Judge in *Bisi Swain and Ors. v. State of Orissa* and Ors. 36 (1970) C.L.T. 31, are applicable to the facts of this case and we have no hesitation to accept the same as enunciating the correct position of law.

11. The second question framed by us is based on the maxim "dominus litis" which means that the Plaintiff is the master of suit and he cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. Various decisions have been placed before us taking divergent views which require a careful consideration. The learned Counsel for the opposite parties placed reliance on the decisions in the case of *Banarsi Dass Durga Prashad Vs. Panna Lal Ram Richhpal Oswal and Others*, *Sreedhar Pani and Others Vs. State of Orissa and Others*, and *Biswanath Mallik and Ors. v. Purushottam Swain and Ors.* C.R. No. 390 of 1979 - D/29-2-1980 and *Guna Mallik and Ors. v. Gopinath Palai and Ors.* C.R. No. 377 of 1979 - D/8-2-1980. In *Banarsi Dass Durga Prashad Vs. Panna Lal Ram Richhpal Oswal and Others*, his Lordship observed that there is a difference of judicial opinion amongst High Courts on the question whether the Court has power under Order 1, Rule 10 of the Code to direct a person to be impleaded as a Defendant when the Plaintiff is opposed to his addition as a party. A number of decisions supporting each of the divergent views have been noticed by the learned Judge and he has prepared to steer a middle course between the divergent views. The following passage would show that his Lordship was impressed that in exercise of the discretion given to the Court under Order 1, Rule 10(2) of the Code, the Court will invariably take into account the wishes of the Plaintiff before adding a third person as a Defendant to the suit and only in exceptional cases, where the Court finds that the addition of a new Defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, it will add a person as a Defendant without the consent of the Plaintiff,

I would prefer to steer a middle course and draw the golden mean. As a rule, the court should not add a person as a Defendant in a suit when the Plaintiff is opposed to such addition. The reason is that the Plaintiff is the dominus litis. He is the master of the suit. He cannot be compelled to fight against a person against whom he does not wish to fight and against whom he does not claim any relief. If opposition by the Plaintiff to the addition of parties is to be disregarded as a rule it would be putting a premium on the undesirable practice of third parties intruding to ventilate their own grievances into a litigation commenced by one at his own expense against another. The word "may" in Sub-rule (2) imports a discretion. In exercising that discretion, the Courts will invariably take into

account the wishes of the Plaintiff before adding a third person as a Defendant to his suit. Only in exceptional cases, where the Court finds that the addition of the law Defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a Defendant without the consent of the Plaintiff.

The decision in the case of Sreedhar Pani and Others Vs. State of Orissa and Others, and the unreported decisions in the case of Biswanath Mallik and Ors. v. Purushottam Swain and Ors. C.R. No. 390 of 1979 - D/29-2-1980 (supra) and Guna Mallik and Ors. Gopinath Palai and Ors. C.R. No. 377 of 1979 - D/8-2-1980 (supra) appear to have accepted the said rule of dominus litis. R.C. Patnaik, J. in the case of Gafur Khan and Others Vs. Government of Orissa and Another, , has taken the view that the said rule can not be used as a strait jacket formula by which the Plaintiff would control the litigation by not adding a party which ultimately may directly affect the intervenor by curtailing the enjoyment of his legal right. In our opinion, the rule of dominus litis is subject to the powers of the Court under Order 1, Rule 10(2) of the Code inasmuch as the said rule authorises the Court to direct addition of further parties to the suit even suo motu where it appears that such impletion is just and the party who has not been joined in the litigation by the Plaintiff is either a necessary or a proper party. The exercise of discretion by the Court in cases where it satisfies the requirements of the rule would be made nugatory if the controlling authority would be the Plaintiff by application of the rule of dominus litis. As a matter of fact, while considering as to whether impletion of a party is necessary to pass an effective and executable decree, or, to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit the Court is required to go into the question as to whether the discretion is to be exercised by it in the facts and circumstances of the case. The exercise of such discretion is a judicial discretion as pointed out by the Supreme Court in the case of Razia Begum Vs. Sahebzadi Anwar Begum and Others, . Therein, the Supreme Court indicated that the question of addition of parties under Order 1, Rule 10 of the Code is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in the facts and circumstances of a particular case. In our opinion, the exercise of such jurisdiction cannot be made subject to the wishes of the Plaintiff, We are, therefore, unable to subscribe to the view that the Court would have no jurisdiction to direct addition of a party to the suit against the wishes of the Plaintiff.

12. In the conclusion, the impugned order reflecting the application praying for impletion of parties by the Petitioners is set aside. This civil revision is allowed, but in the facts and circumstances of the case, there would be no order for costs.

J.K. Mohanty, J.

13. I agree.