

(2006) 06 OHC CK 0002

In the Orissa High Court

Case No : Second Appeal No. 57 of 1986

Jagannath ' Jagamohan Dharua and Others

APPELLANT

Vs

Prithwiraj Singh Dharua and Others

RESPONDENT

Date of Decision : 28-06-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, 151, 9
Criminal Procedure Code, 1973 (CrPC) — Section 145
Limitation Act, 1963 — Article 65
Specific Relief Act, 1963 — Section 34

Citation : (2006) 102 CLT 326 : (2006) 1 OLR 948 Supp

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Advocate : A.K. Sahoo and B.K. Nayak, for the Appellant; B.K. Nayak, B. Sahoo, B.C. Panda, S. Rath and N.C. Pati, for the Respondent

Final Decision : Allowed

Judgement

A.K. Parichha, J.—This appeal has been filed against the judgment and decree passed by the Learned Subordinate Judge, Bolangir in T.A. No. 5/5 of 1984 reversing the judgment and decree of the Learned Munsif, Bolangir in T.S. No. 28 of 1976.

2. Respondent No. 1-Prithwiraj Singh Dharua as plaintiff filed Title Suit No. 28 of 1976 in the Court of Learned Munsif, Bolangir praying for declaration of his title over the suit land pleading inter alia that his predecessor Harihar Singh Dharua, the Gauntia of the Village Barla was in possession of the Bhogra land including the suit land and as successor of Gauntia he was in possession of the Suit Land. On abolition of Gauntia system in 1951, the State Government settled the suit land in his favour along with his brothers (defendant Nos. 5 and 6), as they were the sons of Ex-Gauntia and were found to be in possession of the suit land. It was claimed in the plaint that defendants 1 to 4 (the present appellants), who are strangers to the family of the Gauntia challenged the settlement of the suit land in favour of the plaintiff and defendants 5 and 6 before the Appellate and

Revisional Forums, but their objections were dismissed on merit. It was also averred that there was an amicable settlement between the plaintiff and defendants 5 and 6 wherein the suit land fell to the share of the plaintiff and he accordingly became the exclusive owner and possessor thereof. The suit land was recorded in his favour at the initial stage of the settlement, but defendants 1 to 4 managed to get their names recorded in the raiyati patta in the final stage of settlement and started creating trouble in the possession of the plaintiff over the suit land for which the plaintiff filed the suit for declaration of his title over the said land.

3. The present appellants as defendants 1 to 4 filed their written statement claiming, inter alia, that their predecessors were co-sharers of the Gauntia and were all along in possession of the suit land till the abolition of Gaunti system and as such Bhogra parcha, if any, granted in favour of the plaintiff and defendants 5 and 6 is invalid as they were never in possession of the suit land. Defendants 1 to 4 also claimed that by virtue of long and open adverse possession they have acquired title over the suit land.

4. The trial Court framed as many as 10 issues and received evidence of the parties and on consideration of such evidence it dismissed the suit of the plaintiff with observation that defendant Nos. 1 to 4 were in possession of the suit land, that the suit is hit under Article 65 of the Limitation Act as plaintiff failed to prove his possession over the suit land within 12 years from the date of filling of the suit and that the suit is not maintainable in view of Section 34 of the Specific Relief Act. The plaintiff thereafter carried appeal before the Learned Subordinate Judge, Bolangir in Title Appeal No. 5/5 of 1984 and the said Court allowed the appeal on contest, reversed the findings of the trial Court and declared the title of the plaintiff over the property holding that defendants 1 to 4 could not produce sufficient evidence to establish that they are the co-sharers of the Ex-Gauntia; that the paternal uncle of defendants 1 and 2 had fought litigation and lost his claim over the suit land and defendants 1 to 4 also did not challenge the settlement within the period of limitation; and that defendant Nos. 1 to 4 failed to produce evidence to establish their title by adverse possession. Challenging the said findings the present appeal has been filed.

5. At the stage of admission several questions of law were formulated for consideration, but Mr. Sahoo, learned Counsel for the appellants confined his argument to the following points; (1) that the plaintiff having only claimed for declaration of title and not praying for any consequential relief the suit was not maintainable in view of the bar provided u/s 34 of the Specific Relief Act and further the findings of the trial Court on this issue not having been challenged and the appellate Court having not answered this issue, the finding of the trial Court assumes finality; (2) that once there was a settlement of Bhogra lands on the basis of compromise the Bhogra Officer had no jurisdiction to review or cancel that order or pass a fresh order. In this regard Mr. Sahoo relied on the cases of Sh. Krishan Mohan Singh Vs. Sri Chand Gupta and others, ; Vysyaraju

Badri Narayan Murty Raju v. Member Board of Revenue and Ors. 67 (1989) CLT 576 and Brundaban Sahoo v. Antaryami Sahoo and Ors. 90 (2000) CLT 412 , (3) that the evidence on record disclosing that the plaintiff was not at all in physical possession within 12 years from the date of institution of the suit, the suit was barred under Article 65 of Limitation Act; (4) that defendant Nos,1 to 4 being co-sharers of the Gauntia and possession of one co-sharer being possession of other co-sharers, the suit lands could not have been settled exclusively in favour of the plaintiff and defendant Nos. 5 and 6.

6. Mr. N. C. Pati, learned Counsel for the respondent on the other hand argued that the plaintiff-respondent was already in possession of the suit land and his possession was also confirmed in the Section 145, Cr.P.C. proceeding as well as in the Bhogra Conversion Proceeding. So he was not required to seek consequential relief relating to possession and the suit was never barred by Section 34 of the Specific Relief Act. He also argued that at any stage such defect can be removed by directing the plaintiff to pay the Court fees required for grant of consequential relief and cited the case of Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi, . On the point of jurisdiction of the Bhogra Conversion Officer to recall the earlier order and pass a fresh order, Mr. Pati submitted that each Court/Tribunal has inherent power to recall its order if such order is capricious in nature or tainted with fraud, misrepresentation or mistake. According to him, even a compromise decree can be recalled by the Court under Order-XXIII read with Section 151, CPC. If such decree was obtained by fraud or is representation. In this regard Mr. Pati relies on the cases of Magulu Jal and Others Vs. Bhagaban Rai and Others, ; Sambhu Prasad v. Kailash Chandra Das and Ors. 76 (1993) CLT 517 , Maimun Nisa and Another Vs. Mohammad Khodabin and Others, ; Hakimatum Nisa Bibi Vs. Md. Fakiruddin Khan and Others, Smt. Tara Bai v. V.S. Krisnaswamy Rao AIR 1985 Karn 270 and Sumitra Devi Agarwalla Vs. Sm. Sulekha Kundu and Another, . Regarding the point of limitation and adverse possession, it is submitted that burden of proving adverse possession was on defendants 1 to 4 and the suit of the plaintiff was based on Article 65 of the Indian Limitation Act. So, it was not necessary for him to prove his possession within 12 years, particularly when there is no pleading that the plaintiff and his brothers were dispossessed from the suit land after 1951. It is also submitted by Mr. Pati that the appellant defendants 1 to 4 failed to produce any evidence to establish that they were co-sharers of the Gauntia and as such the possession of the plaintiff or defendants 5 and 6 cannot amount to their possession.

7. There is no dispute that on the incorporation of Orissa Merged Territories (Village Offices Abolition) Act (10 of 1963), all Bhogra lands vested in the State and Collectors were given authority under the Press Note issued by the State Government to settle such lands in favour of persons in actual physical possession. Provision was also made for appeal against the order of Collector to the R.D.C. and the period of limitation for filling such appeal was also indicated. It is submitted that in view of such specific provision of appeal and revision

against the order of settlement passed by the Collector, Civil Court's jurisdiction is excluded. The counter argument is that the jurisdiction of Civil Court as provided u/s 9 of the CPC is general in nature and suit can be filed before the Civil Court challenging the order of settlement passed under Act 10 of 1963, if such order of settlement is capricious or tainted with fraud, misrepresentation or mistake. Whether a suit is maintainable against the order of settlement passed under Act 10 of 1963 and whether the Civil Court can enquire into the controversy were discussed in detail by a Full Bench of this Court in the case of Mangulu Jal (supra). After holding that the Press Note given by the Government and the instructions issued by the Board of Revenue are intra vires and that provision of appeal and revision is available under the Act, the Court gave the following guidelines regarding jurisdiction of the Civil Court in the matter,

On the question of exclusion of jurisdiction of Civil Courts, the following principles may be laid down as well settled :

(i) Exclusion of the jurisdiction of Civil Court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied.

(ii) Even if jurisdiction is so excluded, Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Civil Court would interfere if it finds the order of the special tribunal is unfair, capricious or arbitrary.

(iii) Where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it, a remedy provided by the statute must be followed and the Court's jurisdiction is ousted. The scheme of the particular Act is to be examined to see if remedies normally associated with actions in Civil Suits are prescribed by the statute.

(iv) The legislature may entrust the special tribunal or body with a jurisdiction which included the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to do something more. The Legislature shall have to consider whether there shall be an appeal from the decision of tribunal as otherwise there will be none. In cases of this nature, the tribunal has jurisdiction to determine all facts including the existence of preliminary facts on which exercise of further jurisdiction depends. In the exercise of the jurisdiction the tribunal may decide facts wrongly or if no appeal is provided there from there is no appeal from the exercise of such jurisdiction.

(v) Even in a case when the Civil Court would have jurisdiction on a finding that the special tribunal has acted beyond the scope of its authority as in point No. (ii), it cannot substitute its own decision for that of the tribunal but would give a direction to dispose of the case in accordance with law.

From the above noted observation of the Court, it can be gathered that exclusion

of jurisdiction of Civil Court is not to be readily inferred, unless specifically so provided and even where provision for exclusion of jurisdiction of Civil Court is there such Court would have jurisdiction to examine a case where the statutory tribunal has not complied with the provision of the Act or has not acted in conformity with the fundamental principles of judicial procedure or the order is unfair, capricious or arbitrary. It is, however, to be noted that even though Civil Court would have jurisdiction in the above noted situation, yet it cannot substitute its own decision for that of the tribunal but would simply give a direction to dispose of the case in accordance with law. In other words, even if the tribunal decides facts wrongly while exercising its legal jurisdiction, Civil Court cannot interfere with the finding. In the present case there were Bhogra Conversion Proceedings and by Order (Ext. 7), the suit lands were settled in favour of the plaintiff and defendants 5 and 6. According to the plaintiff-respondent No. 1, after such settlement there was some amicable arrangement between the plaintiff and defendants 5 to 6 and the suit land was exclusively left with the possession of the plaintiff. But, defendants 1 to 4, on the ill advice and instigation of some enemies of the plaintiff, started creating trouble in the peaceful possession of the plaintiff over the suit land for which the plaintiff filed the suit for declaration of his title. In the suit the plaintiff did not challenge the order of Bhogra Conversion Proceeding; rather he challenged the recording of the suit land in favour of defendants 1 to 4 by the settlement authorities. In such situation the jurisdictional bar provided under Act 10 of 1963 was not applicable and jurisdiction of the Civil Court was not ousted.

8. A very lengthy argument was offered by the learned Counsel for the parties regarding the jurisdiction of the Bhogra Conversion Officer in recalling the order recorded by his predecessor and passing a fresh Order (Ext. 7). Mr. Sahoo, learned Counsel for the appellants submitted that law does not provide for the Bhogra Conversion Officer to recall an earlier order and substitute the same by a fresh order. In support of his submission, he relied on the ratio of the case of Vysyaraju Badri Narayan Murty Raju (supra) wherein while analyzing the power of review in a matter relating to Orissa Land Reforms Act, it was observed that the Orissa Land Reforms Act being a complete statute making provision for appeal or revision in respect of orders passed by the Revenue Officer and power of review being a creature of the statute and no such power of review of the judgment on merit by Board of Revenue being available, review of the earlier order was improper. In Brundaban Sahoo (supra) this Court while indicating the distinction between review and recalling an earlier order, made the following observation :

The power of review of earlier judicial or quasi-judicial order can be exercised only if there is a specific provision contained in the statute conferring such jurisdiction on the particular authority. Review is a creature of the statute and in absence of any specific power conferring jurisdiction to review an earlier decision, no judicial authority or quasi-judicial authority can review its own earlier order. The power of recalling an earlier order is slightly different. When

some orders are passed without giving opportunity of hearing, it is stated that every court or even tribunal has got inherent power of recalling such orders. Such power of recalling cannot be equated with power of review.

In the case of Sambhu Prasad (supra) a Full Bench of this Court held that inherent power u/s 151, CPC is not only available to the court to recall its order, but such power would also be available to a tribunal wherein injury is caused to a suitor. It was, however, made clear that such inherent power should not be exercised to override an express provision of an Act. These judicial pronouncements make it clear that a Court or a statutory tribunal can recall its earlier order in exercise of inherent power, if such order is tainted with fraud or mistake. It is argued by Mr. Sahoo, learned Counsel for the appellants, that the earlier order was passed by the Bhogra Conversion Officer basing on a compromise entered into between the parties and, therefore, there was no scope for the succeeding Bhogra Conversion Officer to recall that order and to make a fresh inquiry into the matter or to record a new order. According to him, such action is not permissible under Order 23, Rule 3, CPC or Section 151, CPC. The answer to this submission is available in the cases of Maimun Nisa and Anr. (supra), Hakimaton Nisa v. Md. Fakiruddin Khan and Ors. (supra) and Smt. Sumitra Devi Agarawalla v. Smt. Sulekha Kundu and Anr. (supra) wherein it was essentially held that inherent power u/s 151, CPC is available to the Court and tribunal to recall a decree passed on compromise if such a compromise was based on fraud, misrepresentation or mistake of the Court.

9. The Order (Ext. 7) passed by the Bhogra Conversion Officer shows that during his absence on leave, the Deputy Collector effected a compromise between the parties on 30th July, 1953 and passed an order. Subsequently the present Respondent No. 1 filed petition for recalling that order on the ground that without any inquiry the lands were settled in the name of Jagamohan Dharua and Jayaram Darua, although they were not in possession of the lands in question. Basing on these allegations, the Bhogra Conversion Officer made a fresh inquiry, recalled the earlier order passed by the Deputy collector and passed a fresh order. In the order, when he was temporarily in charge during the absence of the Bhogra Conversion Officer and in the Misc. Case he did not leave any detailed note regarding the enquiry about the actual possession of the disputed plots. Therefore, the Bhogra Officer undertook a fresh inquiry about the possession and claim of the parties and recorded his finding. The Bhogra lands were being enjoyed by Gauntias in lieu of their service and on coming of the Act 10 of the 1963, all such lands vested in the State. As per the provision of the said Act, such lands were to be settled in favour of the persons in actual possession. A duty was cast on the concerned officer to make detailed inquiry about the possession of the land and then to pass the order of settlement. If such enquiry was not made and details of the inquiry was not recorded, the order of settlement was vitiated for violation of the statutory provision. On discovery of such irregularity the tribunal can recall the order in exercise of inherent power without leaving the matter to the appellate or revisional Court. So, recalling of

the earlier order " and making a fresh inquiry about the possession was not an illegality.

10. The argument from the side of the appellants is that they were the co-sharers of the Ex-Gauntia and in that capacity they were in possession of the suit land, and that although this fact had been admitted by the plaintiff before the Bhogra Conversion Officer, the lower appellate Court unreasonably held that they were not the co-sharers and were not in possession of the suit land. In this regard, attention is drawn to the order of the Settlement Officer. Since during Current Settlement draft records of right had been issued in favour of the plaintiff and his brothers and since the Executive Magistrate found the possession of the plaintiff and his brothers over the disputed land after inquiry in the proceedings u/s 145, Cr.P.C. and oral evidence were also there supporting the possession of the plaintiff and his brothers, the lower appellate Court disbelieved the possession of defendant Nos. 1 to 4. Similarly, as defendant Nos. 1 to 4 did not produce any document or credible evidence to show that they were the co-sharers of the plaintiff and had claim over the Bhogra Gauntia land and had also not filed any genealogy to show that they belong to the family of Gauntia, the Court disbelieved the claim that they are co-sharers of the Ex-Gauntia. The judgment of the Learned Addl. Collector, Bolangir in Revenue Appeal No. 81 of 1953-54 (Ext. 2) reveals that defendant Nos. 1 to 4 belong to a separate branch than that of the plaintiff and they do not belong to the same family. It also appears from that order that before 1951 the plaintiff and his brothers were in actual possession of the suit land. The appellants never produced any evidence to show that they dispossessed the plaintiff and his brothers from the suit land after 1951. That being the situation, the plaintiff was not required to prove his possession within 12 years before filing of the suit and the suit was hit under Article 65 of the Limitation Act.

11. Respondent No. 1 as plaintiff in Title Suit No. 28 of 1976 simply prayed for declaration of his right, title and interest over the suit land. Defendant Nos. 1 to 4, the present appellants, in their written statement challenged the maintainability of the suit on the ground that no consequential relief having been prayed for, the suit is hit under the provision of the Section 34 of the Specific Relief Act. They also raised objection that the suit is not maintainable as specific forums of appeal and revision have been provided under the Bhogra Conversion Act and jurisdiction of the Civil Court has been excluded. In paragraph 20 of the judgement, while addressing to Issue No. 7, the Trial Court held that in spite of holding the parcha, the plaintiff was not admittedly in possession of the suit land and so he should have asked for consequential relief for confirmation of possession or recovery of possession and not having done so, his suit was hit u/s 34 of the Specific Relief Act. It was also held that the plaintiff did not go on appeal against recording of the names of defendants 1 to 4 in respect of the suit land although such forum was available under the statute and for that reason the suit was not maintainable before the Civil Court. The judgment of the lower appellate Court does not reflect that these findings on issue No. 7 were seriously

challenged and there is also no finding of the Lower Appellate Court in this regard.

12. Section 34 of the Specific Relief Act reads as follows:

34. Discretion of Court as to declaration of status or right: Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

13. The purpose of Section 34 is to avoid multiplicity of proceedings for which it mandates that failure to include a clear consequential relief, which is necessary to be sought for, a suit with simple prayer for declaration would not be maintainable. The contention raised on behalf of the plaintiff-respondent No. 1 is that since the plaintiff was already in possession of the suit land, it was no necessary to ask for any consequential relief regarding possession. It would appear from the very pleadings of the parties that dispute regarding possession over the suit land was going on and in the W.S. defendants 1 to 4 specifically pleaded that they are in possession of the suit land and have acquired title over the same by adverse possession and the Trial Court also framed issues in this regard. When dispute had been raised regarding possession of the plaintiff over the suit property and the plaintiff himself came up with a case that the defendants 1 to 4 were disturbing his possession, to avoid multiplicity of proceedings consequential relief regarding possession was essential and as per the provision to Section 34 of the Specific Relief Act, suit for simple decree of declaration of right and title was not permissible. The Trial Court, therefore, rightly held that the suit was hit u/s 34 of the Specific Relief Act and was not maintainable.

14. All the foregoing discussions would indicate that the lower appellate Court committed no legal error in accepting and relying on Ext. 7 or holding that the recording of the suit land by the Bhogra Conversion Officer in favour of the plaintiff and his brothers, defendant Nos. 5 and 6, was proper and that the suit was not barred by limitation. But it committed legal omission in not examining whether the suit was hit u/s 34 of the Specific Relief Act. As has been observed earlier, the possession of the plaintiff-respondent No. 1 being under challenge and no consequential relief having been prayed for regarding possession, the suit was hit u/s 34 of the Specific Relief Act and was not maintainable. Since the suit was not maintainable, no relief could have been granted to the plaintiff in the suit. In that view of the matter, the judgment and decree of the Lower Appellate Court becomes unsustainable and is set aside and that of the Trial Court is confirmed.

15. In the result, the appeal is allowed on contest, but, in the circumstances,

without any costs.