

(1962) 12 OHC CK 0003
In the Orissa High Court
Case No : Second Appeal No. 260 of 1960

Jogi Behera and Others

APPELLANT

Vs

Girija Sankar Ray and Others

RESPONDENT

Date of Decision : 13-12-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 43 Rule 1(1), 105, 105(1), 151

Citation : (1963) 29 CLT 256

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : Ranjit Mohanty and R.K. Kar, for the Appellant; Standing Counsel and S.K. Dey, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—The Defendants have preferred both these appeals challenging the decision dated 18-4-1960 of the Additional Sub-ordinate Judge, Cuttack, in Title Appeal Nos. 171 and 172 of 1956, confirming with modification the decision dated 6-9-1956 of the Additional Munsif of Cuttack in Title Suits Nos. 156 and 158 of 1952.

2. The Plaintiffs' case is that the suit-properties forming part of the river-bed of Mahanadi were recorded as Anabadi and Nijchas under Touzi Nos. 1962, 1963, 1964 and 1965 of the Cuttack Collectorate. The original Touzis having been partitioned, the Plaintiffs in Title Suit No. 156/52 got four annas in each of the Touzis 1964 and 1965 whereas the Plaintiffs in Title Suit No. 158/52 got the balance of twelve annas interest in these two Touzis. In Touzi No. 1962 Ganesh Prasad Bhagat and his cosharers had sixteen annas interest while in Touzi No. 1963 the Raja of Kanika had the entire sixteen annas interest. These properties were the subject-matter of partition in Title Suit No. 6 of 1953 in which the Plaintiffs in Title Suit No. 6 of 1953 in which the Plaintiffs in Title Suit No. 156 of 1952 got 270.93 acres and the Plaintiffs in Title Suit No. 158/52 got 657.76

acres in their share.

3. The Defendants were catching fish in the deep-water areas of Mahanadi on the suit plots for a considerably long time merely as lessees from year to year and the Plaintiffs in order to determine the lease-hold right of the Defendants, served them with registered notice asking them not to fish with effect from the last day of Jyastha 1359, and to give up possession by the said date. The Defendants in spite of the notice failed to give up possession and the Plaintiffs have therefore filed the present suits for a declaration that whatever rights the Defendants had acquired for catching fish over the area, had been determined with effect from the last day of Jyastha 1359, and for delivery of possession of the fishery appertaining to the aforesaid Touzis. They also claimed damages to the extent of Rs. 100/-. They also further prayed for an injunction against the Defendants restraining them from catching fish till the disposal of the suits.

4. The Defendants resisted the suits on various grounds. Their main ground was that they were permanent tenants and were not evictable under the law. Alternatively, they claimed adverse possession. It was further contended by them that in view of the vesting of the Touzis in the State of Orissa on 14-9-1953, the Plaintiffs were no longer competent to proceed with the suits and the suits were barred under the provisions of the Orissa Estates Abolition Act (I of 1952). They also challenged the validity of the notice.

5. Both the courts held that the Defendants had no permanent right on the disputed fishery even though they were in possession of the same since the Bhaunria settlement in about the year 1836; and they were merely yearly tenants. They also negated the contention of the Defendants regarding their claim of adverse possession. The notice for eviction was held to be valid and sufficient. As the State was added as a co-Plaintiff in both the suits, the further contention that the suit was not maintainable in view of the Touzis vesting in the State was also negated. The appellate court however, slightly modified the judgment of the trial court inasmuch as he set aside the decree for damages of Rs. 100/- passed by the trial court in favour of the Plaintiffs.

6. Title Suit No. 156 of 1952 was filed on 13-10-1952 and Title Suit No. 158 of 1952 was filed on 27-10-1952. During the pendency of these suits, the estate in question vested in the State of Orissa on 14-9-1953 under the Orissa Estates Abolition Act after which an application was made on behalf of the State under Order 22, Rule 10 of the CPC for the State being added as a party and the said application was allowed on 17-8-1954 by the trial court and the State was added as a co-Plaintiff in both the suits.

7. In this Court, a preliminary objection was raised on behalf of the Appellants that the original Plaintiffs having lost their interest in the "estate" they were debarred from proceeding with the present suits. It was contended that as a result of the vesting of the estate in the State of Orissa with effect from 14-9-1953 the intermediary ceased to have any interest in the entire estate

including rivers and fisheries and the same vested absolutely in the State, and having lost all interest in the estate the intermediaries cannot obtain possession of the suit-fisheries even if they obtain decrees to the effect. In support of this contention reliance was placed on a decision of the Supreme Court reported in Haji Sk. Subhan Vs. Madhorao, where their Lordships while dealing with the effect of vesting under the M.P. Abolition of Proprietary Rights Act (I of 1961) held:

The proprietary right vested in the State and as a consequence of it, the proprietor's right under the decree to obtain possession also vested in the State even though the State got right to the possession of the land under other provisions of the Act as well.

In view of this position in law, it is no longer open to dispute that the present intermediary-Plaintiffs cannot proceed with the suit and the State alone can do it. As a matter of fact no counsel for the original Plaintiffs appeared.

8. It was next contended that the State of Orissa does not come within the ambit of Order 22, Rule 10, CPC and was incompetent to prosecute the suits. It is argued that the vesting of the estate in the State of Orissa is not an act of assignment, creation or devolution of any interest during the pendency of the suits as contemplated in that Rule and as such the State cannot prosecute the suit, and accordingly the order passed by the trial court, adding the State as a co-Plaintiff was illegal and has to be ignore.

9. The order passed by the trial court on 17-8-1954 allowing the application of the State under Order 22, Rule 10 was not challenged in appeal by the Defendants-Appellants. That an order under Order 22, Rule 10 is an appealable one cannot be disputed in view of the provisions of Order 43, Rule 1(1) Code of Civil Procedure. In the absence of an appeal that order became final and binding on the parties.

10. Mr. Mohanty, learned Counsel for the Appellants, however, contended that in view of the provisions of Section 105, CPC it was still open to him to challenge that very order even in this appeal. Section 105 runs as follows:

(1) Save as otherwise expressly provided no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in Sub-section (1) where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal there from he shall thereafter be precluded from disputing its correctness.

So to attract the provisions of Section 105(1) two conditions are necessary; firstly, the order in question must affect the decision of the case and secondly the

requisite objection against the order must have been put forth in the memorandum of appeal. In support of his contention, Mr. Mohanty relied upon a single judge decision of the Rajasthan High Court reported in *Amar Singh v. Chaturbhuj and Ors.* AIR 1957 Raj 367. That was a case where the very defence of the Defendants was struck out on account of non-production of certain documents and thus the order by its very nature affected the decision of the case. In the present case, however, mere addition of the State as a co-Plaintiff has nothing to do with the merits of the case itself as it is immaterial whether the original intermediary-Plaintiffs or the State in whom the suit-properties vested subsequently, prosecuted the suits. Moreover, on a perusal of the memorandum of appeal, it is clear that no such objection was also taken.

11. Mr. Rath, learned Counsel for the State, however, relied upon a Division Bench decision of the Lahore High Court reported in AIR 1933 152 (Lahore) and a similar decision of the Madras High Court reported in *Subramania Iyer and Ors. v. Muthu Vaithilinga Mudaliar and Ors.* AIR 1919 Mad 971. In the Lahore case, their Lordships held that an order setting aside an abatement and allowing substitution of the heirs of the deceased party cannot be questioned in appeal from the decree in the suit whether such an order is passed before, or simultaneously with the decree, such an order no being one which affects the decision of the case with reference to its merits within the meaning of Section 105. To the similar effect is the decision of the Madras High Court where their Lordships had held that an order passed by an appellate Court deciding the question as to who are the representatives of a deceased party is as final as a similar order passed by the Court of first instance and its propriety cannot be questioned in an appeal on the merits from the final decree. These two decisions are more to the point now under consideration. Thus, in view of this legal position, the contention of the learned Counsel for the Appellant it is still open to him to challenge the order of the trial court adding the State as a co-Plaintiff can not be accepted at this state.

12. It was further contended on behalf of the Appellant that the vesting of an estate does not amount to an assignment, creation or devolution under Order 22, Rule 10 of the CPC and therefore, the order passed on 17-8-1954 by the trial Court is erroneous and in support of this contention reliance was placed upon a Division Bench decision of this Court reported in *Praful Kumar Dhal v. Kali Panda and Anr.* 27 C.L.T. 17. In that case the State could be substituted in place of the original Plaintiff never came up for consideration. In that case the State was not a party and their Lordships held that the Government as the ultimate owner of all properties in the State becomes owner of the estate vesting in it with the rights of the intermediaries completely wiped out, and is not the successor-in-interest of the intermediary and the Government will not be bound by the decree passed in its absence like a transferee pendente lite as in the case of transfer. In that case it was held that the Plaintiff who had lost all his interest in the property should not be allowed to continue his case. In the present appeal thus it cannot be disputed that the original Plaintiffs had no right to prosecute the suit itself. As

a. matter of fact it is the State who is now proceeding with the suits. This decision rather supports the contention tat the State is a necessary party after vesting. No doubt this decision has laid down that under the Estates Abolition Act vesting of the interest of an intermediary cannot be taken to be a case of assignment, creation or devolution as contemplated under the Rule as the Government do not by the vesting come in as a successor-in-interest of the intermediaries but as the ultimate owner of the estate by reason of the vesting. In view of the aforesaid decisions, discussed in the preceding para, however, it is not open to the Appellant to raise that question at this stage as the order adding the State as .a party does not affect the merit of the appeals. Moreover, it cannot be disputed that apart from Order 22, Rule 10 the Court can also add any party at any stage of a case for ends of justice as contemplated under Order 1, Rule 10 and Section 151 of the Code of Civil Procedure. Thus, in any view of the matter, the State has the right to proceed with the suit. Accordingly, the preliminary objection raised must therefore fail.

13. Now I shall examine the merits of the case. No dispute is made in the appeal about the validity of the notice given to the Defendants to vacate possession of the disputed fishery and it is also undisputed that they were in possession of the fishery right from at least the Bhaunria settlement until the tenancy was terminated by the aforesaid notice. The main question for consideration is whether the Defendants have acquired any permanent right over the fishery as claimed by them or they were merely tenants from year to year as contended by the Plaintiffs. The Defendants in support of their claim mainly relied upon the following documents, viz., exts. A, B, C, J, Q and some other rent receipts. Ext. A is the certified copy of the Khatian of Bhaunria settlement. In that there is a note to the effect that "Souri Behera has been given the "Machhadia" (fishery right)." There is no intention about the rate of rent or about the period for which it was given. Ext. B is the certified copy of the Khatian of the provincial settlement. It shows that Bhagaban Behera, Narayan Behera and Jagannath Behera had executed a Kabuliyat in respect of the fishery right on an annual rental of Rs. 102/- till the next settlement. It is not disputed that Bhagaban Beher and others are the descendants of Souri. Ext. C is the Revisional Record of Rights howing that Narayan Behera, Bhikari Behera etc. were in possession of the fishery right with annual rental of Rs. 100/-. In the Revision Settlement Khatian, however, there is no entry to the effect that the Kabuliyat has been given till the next settlement as had been noted in the Provincial Settlement. In the Current Settlement entries, Ext. 1 there is complete absence of any note regarding the fishery lease of the Defendants. The Defendants however relied on the recitals in the Ekpadias, Ext. Q that was filed by the landlords before the Settlement Officer. That shows that Narayan and Bhikari executed a Kabuliyat in respect of the fishery right till the next settlement. Ext. J is the Revenue Assessment Report relating to the Current Settlement. From that it appears that the fishery was in Khas possession of the landlords, though it had been let out on an annual rental of Rs. 100/-. None of these documents is, however, decisive to make out a case

of permanent tenancy in favour of the Defendants. The effect of all these documents may at best show that the Defendants used to execute periodical Kabuliyats in favour of the landlords on the basis of an annual rent fixed from time to time. The fact that the rent was being varied from time to time cannot also be doubted. At the time of the Provincial Settlement it was fixed at Rs. 102/-, but in the Revision Settlement and subsequent thereto it was fixed at Rs. 100/-. From the rentreceipts, Ext. 3 series it also appears that the rent at varying rates was being paid to the landlords. Mr. Mohanty, learned Counsel for the Appellants, contended that presumption of permanent tenancy in respect of the right of fishery can be made in favour of the Defendants in view of the undisputed possession of the Defendants ranging from generation to generation, well over 100 years. No doubt, it is so. but that was because fresh Kabuliyats were being executed by the Defendants from time to time, thus giving a fresh start each time to the lease in their favour. Mr. Mohanty, relied upon several decisions in support of his contention which I shall presently discuss.

14. In the case reported in Priyanath Ghose and Others Vs. Surendra Nath Das and Others, it was the case of both parties that the holding in question was a transferable one and settled at a fixed rent. The question arose whether any increment in the rent would destroy the nature of the tenancy. Their Lordships held that where the tenancy was heritable and held not for a limited period and was subject to payment of fixed rent and was unquestionably transferable, the circumstance that one of those elements was altered by agreement of parties, viz., the rent originally fixed was increased does not necessarily destroy the transferable character of the tenancy.

15. In the case reported in AIR 1937 370 (Lahore) following the aforesaid decision of the Calcutta High Court their Lordships held that where a tenancy as originally created is heritable and transferable, not held for a limited term and subject to the payment of a fixed rent, the circumstance that by agreement of parties the rent originally fixed is subsequently raised is not sufficient to lead to an inference of a novation of contract resulting in a tenancy with a fresh start in all respects, so as to affect it a transferable or heritable character.

16. In Upendra Krishna Mandal v. Ismail Khan Mohamed In 31 Ind App 144 it was a case where the holdings in question were subject to transmission by sale and mortgage and there was also the admission of the landlord about the existence of the right of the tenant from which a permanent tenancy could be inferred. The case reported in Naba Kumari Debi v. Biharilal Sen and Ors. In 34 Indian Appeals 160 is almost to the same effect. There the landlord assented to the transfers made by the tenant. The holdings were sold again and again by Kabalas purporting to convey absolute interest. It has also passed by will. These decisions however are clearly distinguishable and are not of any help to the Appellants. There is no evidence here to show that the tenancy was ever a heritable or transferable one. On the other hand the documents show that Kabuliyats were executed by the Defendants for periodical leases from one

settlement to the other.

17. Mr. Rath relied upon a decision reported in *Subrahmanya Chettiar v. V.P. Subrahmanya Mudaliar* AIR 1929 P.C. 156 where their Lordships have held that the mere proof of remaining in undisturbed possession of some of the lands in question for along period at a more or less uniform rent is not enough. Permanence is not universal and integral incident of an under-raiyat's holding. If claimed, it must be established. This may be done by proving custom, contract or a title and possibly by other means. In the other case cited by him in *Kamal Kumar Datta and Another Vs. Nandalal Dubey*, a Division Bench of that Court held that the mere circumstance that the tenant and his family have for a very long time been allowed to continue residing in the same place without any variation in the rate of rent is a circumstance which itself is an insufficient foundation for holding that the tenants' right was permanent in its origin. It was further held that succession are in themselves poor evidence that the tenancy is being treated as a tenancy heritable as a matter of right. In view of this legal position it must be held that the Plaintiffs have failed to prove that they were permanent tenants in respect of the suit-fisheries.

18. The only other question that remains to be considered is whether the Defendants have acquired a right by adverse possession. The Defendants admitted that they have been paying yearly rent after the current settlement thus maintaining their relationship as yearly tenants. It was, however, contended on behalf of the Appellants that after the current settlement they have been asserting their permanent right on the suit-fisheries and as no *Kabuliyat* was executed during the current settlement, their possession thereafter should be presumed to be hostile against the landlords and since more than 12 years have passed from the date, of last settlement, the Defendants have acquired title by adverse possession. It may be noted that there is nothing to show that they claimed any hostile title against the landlords since the current settlement. On the other hand the rent-receipts show that they have been paying yearly rent in the usual manner age they were doing before. There was no change in the position even after the current settlement to make out a case of adverse possession. In other words they are continuing in their possession in the same way as tenants of the Plaintiffs. Mr. Mohanty relied upon a decision of this Court reported in *Bholanath Panigrahi Vs. Shyamsundra Bose and Others*, . In that case it was held by their Lordships that when a non-transferable holding is transferred in its entirety, it amounts to an abandonment by the tenant of that holding. The landlord is entitled to exercise his right of re-entry on the date of transfer. The possession of the transferee is adverse from its very inception as he has entered upon the land under a void transaction. Time therefore runs against the landlord from the date of the transfer, and if the adverse possessor remains in possession for over twelve years, the title of the tenant is completely extinguished and so also the landlord's right to recover, if he does not enforce his right to reenter or recover within the period of limitation. This case is also clearly distinguishable on facts. In that case to the very knowledge of the landlords the transferee-Plaintiff

was in possession, but the landlord allowed the Plaintiff to remain in possession and did not take any steps to effect re-entry.

19. The other case relied upon by Mr. Mohanty is a case reported in *Kala Devi and Others Vs. Khelu Rai and Others*, . That was a case where Kurfa lease of a non-transferable holding which was invalid u/s 27(1) of Regulation III of 1872 was made and the lessees remained in possession for more than 12 years in open assertion of permanent tenancy and their Lordships held that the transferee-lessee acquired a right by prescription and could not be ejected and the mere fact that they were paying rent is no bar to the acquisition of such right. The other case relied upon by learned Counsel for the Appellants was a case reported in *Ram Rachya Singh and Ors. v. Kumar Kamakhya Narayan Singh* AIR 1925 Pat 261. There it was held that where there are claims openly asserted and not withdrawn by the tenant which suffered to continue in possession, the admissions of the parties cannot create, preserve or revive undisputed conditions of the continuous right of the relationship of the landlord and tenant which conflict with claims asserted by tenant such as adverse possession. In the present case, however, there is nothing to show that the Defendants openly asserted their hostile title and were still allowed by the landlord to continue in possession of the disputed fishery. Therefore none of the above decisions is of any avail to the learned Counsel for the Appellants to make out a case of adverse possession.

20. In the light of aforesaid discussions, it must be held that the Defendants-Appellants had no permanent right on the disputed fishery, nor have they acquired any title by adverse possession over the same. In view of this position, I must hold that the decision of the court below is correct and is maintained.

21. In the result, the appeals are dismissed but under the circumstances of the case parties are to bear their own costs throughout. Appeals dismissed.