
(2016) 12 OHC CK 0005

In the Orissa High Court

Case No : Regular Second Appeal No. 280 of 2014, (From the judgment and decree dated 28.02.2014 and 14.03.2014 respectively passed by Shri S.K. Paty, District Judge, Keonjhar in R.F.A. No. 59 of 2011 confirming the judgment and decree dated 08.11.11 and 24.11.11 re

Kalitirtha Kalipuja Committee

APPELLANT

Vs

Sri Balunkeswar Mahesh Bijje Attopur

RESPONDENT

Date of Decision : 21-12-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2017) 123 CutLT 480 : (2017) 1 ILRCuttack 303 : (2017) 1 OJR 197

Hon'ble Judges : Dr. A.K. Rath, J.

Bench : Single Bench

Advocate : Mr. Bidyadhar Mishra, Senior Advocate, for the Appellant; Mr. Ganeswar Rath, Senior Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Dr. A.K. Rath, J.—This is an appeal against the judgment and decree dated 28.02.2014 and 14.03.2014 respectively passed by the learned District Judge, Keonjhar in R.F.A. No. 59 of 2011 confirming the judgment and decree dated 08.11.11 and 24.11.11 respectively passed by the learned Civil Judge (Sr. Divin.), Keonjhar in C.S. No. 125 of 2008.

2. The respondent as plaintiff instituted the suit for permanent injunction. The case of the plaintiff is that Sri Sri Balunkeswar Mahesh bije Atopur (Badasasan) is a public deity governed under the Orissa Hindu Religious Endowments Act, 1951. The Executive Officer is looking after the management and affairs of the deity. The suit schedule land belongs to the deity. The defendant has no semblance of right, title and interest over the property of the deity. It proposed to place tents on different parts of the suit land, use the suit land as kalyan mandap and allow different persons to utilize the suit land on different occasions for different purposes and let out the suit land to different business concerns to

organize mina bazar by conducting opera show from 28.10.08 on the pretext of observing Kalipuja. The defendant has assessed a huge sum of money for its personal gain.

3. Pursuant to issuance of summons, the defendant entered appearance and filed written statement contending, inter alia, that the suit is not maintainable, bad for non-joinder of necessary parties and noncompliance of mandatory provision of Order 1, Rule 8 C.P.C. The plaintiff has no right, title and interest over the suit land. The ROR issued in favour of the plaintiff is the outcome fraud and misrepresentation of facts. The plaintiff was never a public deity. The deity was installed by the Brahmins of Badasasan, Keonjhar and as such it is their private deity. Although on 5.5.1970 it was declared as public deity and taken up by the Commissioner of Endowments, after the intermediary estate vested in the Government on 3.1.1970, no list of property of the deity was furnished or declared. Mere payment of rent or order passed in settlement case no.40/86 cannot bestow any right, title and interest in favour of the deity in respect of the suit property. The Executive Officer is not the representative of the deity. The deity is represented by the Executive Officer, Keonjhar debottar-cum-Sub-Collector, Keonjhar. The present Executive Officer has no locus standi to file the suit. The ROR was published in the year 1981. The suit land was recorded in favour of the State as Patita. Area Ac.0.04 dec. of land appertaining to plot no.370, khata no.137 is recorded as Debighar and the rest part of the suit land in possession of the defendant, which is known as Kalipadia. The Kalitirtha Kalipuja committee was started by the Ex-Ruler of Keonjhar in 1941. Since then the suit land remains under the possession and management of the defendant. The defendant was duly permitted to carry on mina bazar and opera show on 28.10.2008. The defendant has used the suit land for various public purposes, i.e., for the benefit of the general public and state. The further case of the defendant is that the suit land, i.e., Hatiatangar Mouza was given as "Chakada dan" by Ex-Ruler of Keonjhar Estate in the year 1953 at the time of establishment of "Badasasan". The status of the land was accepted as "Brahmotor". The brahmins of Badasasan established Lord Siva and constructed temple of Balunkeswar Mahesh. For seva puja and nitikranti of Lord Balunkeswar Mahesh, the brahmins of Badasasan donated an area Ac.10.50 dec. of land. In 1915 settlement, the total land of Hatiatangar mouza, i.e., area Ac.105.55 dec. was recorded as Debottar Niskar in the name of Balunkeswar Marfat "State". Though the land of Hatiatangar mouza was in sub-judice before the Collector, the plaintiff managed to settle an area Ac.48.61 dec. of land fraudulently under Section 7-A of the Orissa Estate Abolition Act, 1951 (hereinafter referred as "O.E.A. Act") in case no. 62/85 in Board of Revenue. In the application for settlement, the plot number, area, kism and actual status of the land were not furnished. Subsequently relying on the ROR, another ROR was wrongly issued in the year 1983 in favour of the plaintiff which is an outcome of fraud. The same do not confer any title for the plaintiff. In such circumstances, the simple suit for permanent injunction is not maintainable.

4. Stemming on the pleadings of the parties, learned trial court struck five issues. The same are :

"(1) Whether the suit is maintainable ?

(2) Whether the plaintiff has cause of action to file the suit ?

(3) Whether the plaintiff has right, title, interest and possession over the suit property ?

(4) Whether the defendant is in possession of the suit land having an interest therein ?

(5) Whether the plaintiff is entitled to get the relief as claimed in the suit ?"

5. To substantiate the case, the plaintiff had examined five witnesses and on its behalf fourteen documents had been exhibited. The defendant had examined three witnesses and on its behalf eighteen documents had been exhibited.

6. Learned trial court came to hold that the plaintiff has right, title, interest and possession over the suit land except suit plot no.370 and 371. The defendant has no right, title, interest or possession over the suit land save and except its right to perform Kalipuja over the suit plot no.370 and 371 and accordingly answered issue nos.3 and 4. It is further held that suit is maintainable. Held so, the learned trial court decreed the suit in part. The defendant has unsuccessfully challenged the judgment and decree of learned trial court before the learned District Judge, Keonjhar in R.F.A. No. 59 of 2011, which was eventually dismissed.

7. The second appeal was admitted on 28.10.2015 on the substantial question of law enumerated in ground no. A of the appeal memo. The same is quoted hereunder.

"(A) Whether the plaintiff-respondent has acquired any right, title and interest over the suit land in view of the fact that the land in question has been settled under section 7(A) of the O.E.A. Act and while settling the land in favour of the plaintiff-respondent, the Member, Board of Revenue has not followed the mandatory requirement of law required to be followed while settling land under section 7(A) of the O.E.A. Act ?"

8. Heard Mr. Bidyadhar Mishra, learned Senior Advocate for the appellant and Mr. Ganeswar Rath, learned Senior Advocate for the respondent.

9. Mr. Mishra, learned Senior Advocate for the appellant argued with vehemence that the suit has been filed by a person in representative capacity as Executive Officer of the plaintiff. The defendant is a registered society consisting of members of general public. In view of the same, the plaintiff is bound to comply the mandatory provision of Order 1, Rule 8 C.P.C. The same has not been done. The Executive Officer has no locus standi to represent the plaintiff. He further submitted that the simple suit for permanent injunction without a prayer for declaration of title is not maintainable. The finding of the learned trial court that

any defect in title of the plaintiff of the suit land has been rectified by the settlement under Section 7(A) of the O.E.A. Act which cannot be challenged in the civil court is perverse. Referring to first proviso to sub-section (1) of Section 8 of the O.E.A. Act, he submitted that the Member, Board of Revenue has not followed the mandatory provisions enumerated in O.E.A. Act in settling the land in favour of the plaintiff on 3.10.1985 in Case No. 62 of 1985 vide Ext.3. Public notice was not issued for which the general public including the defendant could not be able to stake its claim. He further submitted that the application was made on 17.9.1985. The Collector recommended the case on 19.9.1985 and the order of settlement was passed at 3.10.1985 without giving public notice. The order is without jurisdiction and is nullity. It's invalidity could be set up even in collateral proceedings. He further submitted that pursuant to the order of the Member, Board of Revenue, the Tahasildar settled the land in favour of the plaintiff on 10.7.1987. In O.E.A. Lease Revision No. 2/80, the plaintiff's claim was rejected vide Ext.J. Thereafter, the plaintiff filed O.J.C. No. 3374/88. The same was dismissed. Thus the whole transaction obtaining settlement is tainted with fraud. He further submitted that the plaintiff was not in possession of any portion of the suit land. On the other hand, the defendant was all along in possession over the same performing Kali Puja. The possession of the defendant has been admitted by the plaintiff in W.P.(C) No. 671 of 2008 vide Ext.M-1. He further submitted that where there is a competition between two persons, one claiming occupancy right and the other claiming khas possession as an intermediary on the date of vesting, the rival claims would be determined by the Estate Abolition Collector. In the event the claims are decided after following the mandatory formalities, then the decision is final and conclusive and cannot be questioned in a civil court. But then the civil court has jurisdiction to examine whether the public notice prescribed under the first proviso to Section 8-A of sub-section (1) of O.E.A. Act inviting objection from persons interested was complied with. He further submitted that the Trust Board of the plaintiff filed application during pendency of the O.E.A. Revision. The said fact was not disclosed. The plaintiff is guilty of suppressio veri and suggestio falsi. He further submitted that the plea of res judicata cannot be raised for the first time in the second appeal. Since the plaintiff was not in possession of the suit land, the settlement of land in favour of the plaintiff by the Member, Board of Revenue is bad in law. The plaintiff simultaneously prosecuted two parallel proceedings for the same relief before two different forum for settlement of the land. The same is an abuse of process of the court. He relied on the decisions in the case of Kiran Singh and others v. Chaman Paswan and others, AIR 1954 SC 340, Raghunath Panigrahi v. Udayanath Sahu and others, 1969 ILR (CUT) 214, Baikuntha Das v. Sabitri Devi and another, 1971 ILR (CUT) 1065, Radhamohan Malia and another v. Basudeb Khuntia and others, AIR 1981 ORISSA 16, S.L. Narasing Rao and others v. Gopaljee Mahaprabhu and others, AIR 1990 ORISSA 177, Lakhana Nayak and another v. Basudev Swamy and others, AIR 1991 Orissa 33, Laxmi Dibya (since dead) and after her Smt. Suvasin Mohapatra v. Sridhar Suar and others, 1991 (II) OLR 12, S.P. Chengalvaraya Naidu (dead) by L.Rs., v. Jagannath (dead) by

L.Rs. and others, AIR 1994 SC 853, V. Rajeshwari (Smt) v. T.C. Saravanabava, (2004) 1 SCC 551, Dalip Singh v. State of Uttar Pradesh and others, (2010) 2 SCC 114, Meghmala and others v. G. Narasimha Reddy and others, (2010) 8 SCC 383 and Smt. Badami (Deceased) By Her L.R. v. Bhali, AIR 2012 SC 2858.

10. Per contra, Mr. Rath, learned Senior Advocate for the respondent submitted that the land was settled by the Member, Board of Revenue in favour of the plaintiff-deity. Due procedure has been followed by the Member, Board of Revenue while passing the order of settlement. The said order has not been challenged by the defendant and as such attained finality. He submitted that C.S. No. 135 of 2006 was filed by one Rankanidhi Pati and another against the plaintiff-deity and others for a declaration that Kali Tirtha Committee and general public of Keonjhar have customary and easementary right over the suit land and permanent injunction. The learned trial court came to hold that the plaintiff has right, title and interest over the suit land. Further the present plaintiff-respondent has filed C.S. No. 107/2007 impleading the Collector and Sub-Collector, Keonjhar as well as the present appellant as defendants for recovery of Rs.60,000/- from defendant no.3 and to injunct the defendant nos.1 and 2 from issuing any permission in favour of defendant no.3 to perform opera, mina bazaar, etc. in the court of the learned Civil Judge (Sr. Divn.), Keonjhar. Learned trial court came to hold that the suit land belongs to the deity. Defendant no.3, present appellant, does not have any interest over the same. Both the judgments had attained finality. In view of the same, the defendant cannot question the title of the plaintiff. He further submitted that DW-3, who happens to be the Secretary of Kali Puja Committee, defendant, in his cross-examination has stated that the committee was registered in the year 1981-82. Thus by no stretch of imagination it can be said that the committee was in possession of the land before vesting in the State Government. He further submitted that the defendant is a stranger. The defendant has no right to interfere with the possession of the plaintiff. Allegation of fraud has not been specifically pleaded. The said issue has been dealt with by the learned appellate court and negatived.

11. Before proceeding further, it is apt to refer the decisions cited at the Bar.

12. In Kiran Singh and others (supra), the apex Court held that decree passed 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. A defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree and such a defect cannot be cured even by consent of parties.

13. In Raghunath Panigrahi (supra), it was held that when there is a competition between two persons, one claiming occupancy right and the other claiming khas possession as an intermediary on the date of vesting, the same has to be determined by the Estate Abolition Collector. In the event the claims are decided after compliance of the mandatory formalities then the decision is final and

conclusive and cannot be questioned in civil court. The civil court can only examine and see if the Estate Abolition Collector abused its power and did not act under the Act, but in violation of its provisions. The civil court can examine as to whether the public notice prescribed under the first proviso to Section 8-A, sub-section (1) inviting objection from the interested was complied with. There is no quarrel over the proposition of law.

14. Seventy-five years ago, the Privy Council in the case of *Secretary of State v. Mask and Co.*, AIR 1940 PC 105 held that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if the jurisdiction is so excluded, the 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.

15. In *Baikuntha Das (supra)*, this Court held that the object of notice under Section 8-A(2) of the O.E.A. Act is to give wide publicity to a claim under Section 8-A. The provision is mandatory. It is not open to the Collector to omit any process of such publication.

16. In *Radhamohan Malia and another (supra)*, this Court held that when mandatory provision of Order 1, Rule 8 (2) is not complied with, decree is liable to be set aside. The same view was reiterated in *Lakhana Nayak and another (supra)*.

17. In *S.L. Narasing Rao and others (supra)*, a Division Bench of this Court held that under Section 7-A power is vested in the State Govt. to settle land, tank or building in the vested trust estate which were used for certain purposes and which are needed for carrying out the purpose of the trust efficiently, with the person who immediately before such vesting was an intermediary in respect of such land or tank or building. The power of the State Government has been delegated to the Board of Revenue by a notification and is not available to be exercised by the Addl. District Magistrate or the O.E.A. Act Collector. In the said case, the deity was not in possession of the land on the date of vesting. Thus, the O.E.A. Collector has right in holding that the claim of the managing trustee for settlement of the land under Section 6 having failed the land must be held to have vested in the State Government free from all encumbrances under Section 5 of the Act. But the same is not the case here. Thus, the said decision is distinguishable.

18. In *Laxmi Dibya (since dead) and after her Smt. Suvasin Mohapatra (supra)*, this Court held that if the statutory procedure is not followed then the order of settlement is void and illegal.

19. In *S.P. Chengalvaraya Naidu (dead) by L.Rs. (supra)*, the apex Court held that a judgment or decree obtained by playing fraud on the court in a nullity and nonest in the eyes of law. Such a judgment/decreed has to be treated as a nullity

by every court. It can be challenged in any court even in collateral proceedings. The same view was reiterated in Smt. Badami (Deceased) by Her L.R. (supra) and in Meghmala and others (supra).

20. In V. Rajeshwari (Smt.) (supra), the apex Court held that the plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal.

21. In Dalip Singh (supra), the apex Court held that the party approaching the court by suppressing the fact is not entitled to be heard on merit.

22. Shri Shri Balunkeswar Mahesh Bije at Atopur (Badasasan), Keonjhar, plaintiff, is a public deity. It is governed under the provision of the Orissa Hindu Religious Endowments Act, 1951. The Commissioner of Endowments has appointed the Executive Officer of the deity to manage the affairs. Thus the Executive Officer is the competent person to represent the deity. DW3, who is the Secretary of the defendant, deposed that the defendant is a registered society. In view of the assertion of the plaintiff that the defendant having no semblance of right, title and interest over the suit property forcibly entered into the suit land, notice under Order 1, Rule 8 C.P.C. is not a sine qua non.

23. The next question does arise as to whether the simple suit for permanent injunction is maintainable ?

24. In Anathula Sudhakar v. P. Buchi Reddy (Dead) by L.Rs. and others, AIR 2008 SC 2033, the apex Court in paragraph 11 held thus :

"11. The general principles as to when a mere suit for permanent injunction will lie, and when it is necessary to file a suit for declaration and/or possession with injunction as a consequential relief, are well settled. We may refer to them briefly.

(11.1) Where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction. But a person in wrongful possession is not entitled to an injunction against the rightful owner.

(11.2) Where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek in addition, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession.

(11.3) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from defendant, the plaintiff will have to sue for

declaration of title and the consequential relief of injunction. Where the title of plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

25. The assertion of the plaintiff is that deity is the true owner of the land. The defendant, who has no semblance of right, title and interest over the suit schedule property, intends to let out the land to different persons to organize mina bazaar and opera show, which will like to continue on the pretext of Kali Puja and thereby collecting rent. The defendant forcibly used the land.

26. The judgment passed in C.S. No. 135 of 2006 as well as C.S. No. 107/2007 have been exhibited as Exts.9 and 10 respectively without objection. In C.S. No. 135/2006, the plaintiff claiming to be represented to Keonjhar Town sought for declaration that Kali Puja Committee and general public of Keonjhar have customary and easementary right over the suit land by prescription of title and permanent injunction. The plaintiff-deity was defendant no.1. Learned trial court held that defendant no.1 has right, title and interest over the suit land and it is in possession over the suit land. The said judgment attained finality. The present plaintiff-respondent instituted C.S. No. 107/2007 for recovery of money and injunction impleading the Collector and Sub-Collector, Keonjhar as well as the present defendant. The present defendant was the defendant no.3 in the said suit. In issue no.4, "Whether defendant no.3 has interest in the suit land ?", learned trial court came to hold that the plaintiff is the owner of the suit land. Defendant no.3 admitting the ownership of the plaintiff prayed to Sub-Collector, Keonjhar for granting permission. The permission was granted. Thus the plaintiff is entitled to get ground rent from defendant no.3 used the suit land of the plaintiff during Kali Puja. It was further held that the suit land belongs to the deity. The defendant no.3 cannot have any interest over the suit land regarding organizing any function. The said judgment also attained finality.

27. There is no whisper with regard to the institution of the earlier suit in the written statement. The judgments have been exhibited by the plaintiff without objection. In view of the same, it is no more open on the part of the defendant to say that they are not bound by the said judgment. The said judgments operate as res judicata in the subsequent proceedings. The Member, Board of Revenue has settled the land on 3.10.1985 in favour of the plaintiff vide Ext.3. The said order has attained finality. No counter claim has been filed by the defendant. In the absence of any challenge to the same, the civil court cannot examine the correctness of the order passed by the Member, Board of Revenue in an O.E.A. proceeding.

28. Even otherwise, the submission of Mr. Mishra, learned Senior Advocate for the appellant that the order passed by the Member, Board of Revenue without following the mandatory provisions of O.E.A. Act is a nullity and fraud has been committed on the court while settling the land is difficult to fathom. The deity has filed the application, where after notice has been issued. Thereafter the

order was passed. Any person aggrieved could have challenge the order of settlement, but the same has not been done. Merely saying that it is a void is not suffice.

29. In *State of Kerala v. M.K. Kunhikannan Nambiar*, AIR 1996 S.C. 906, the apex Court held that even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact be effective inter parties until it is successfully avoided or challenged in higher forum. Mere use of the word "void" is not determinative of its legal impact. The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise. The apex Court went in depth into the jurisprudential concept of "void" and "voidable" and held thus :

"7. In *Halsbury's Laws of England*, 4th edition, (Reissue) Volume 1(1) in paragraph 26, page 31, it is stated, thus :-

"If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved."

In the *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell, 1995 edition, at pages 259-260 the law is stated, thus :-

"The erosion of the distinction between jurisdictional errors and non-jurisdictional errors has, as we have seen, correspondingly eroded the distinction between void and voidable decisions. The courts have become increasingly impatient with the distinction, to the extent that the situation today can be summarised as follows :

(1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent Jurisdiction."

Similarly, Wade and Forsyth in *Administrative Law*, Seventh edition- 1994, have stated the law thus at pages 341-342 :-

".....every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law. In a well-known passage Lord Racliffe said:

An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

This must be equally true even where the brand of invalidity is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects."

30. In view of the authoritative pronouncement of the apex Court in the case of Anathula Sudhakar (supra), the inescapable conclusion is that the simple suit for permanent injunction is maintainable. The settlement of land by the Member, Board of Revenue under Section 7-A of the O.E.A. Act in favour of the plaintiff in case no. 62/85 has attained finality and binding between the parties. The plaintiff-deity has right, title and interest over the suit schedule land except plot nos.370 and 371 where "Kali Temple" exists.

31. Resultantly, the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.