

(1972) 04 OHC CK 0029

In the Orissa High Court

Case No : Second Appeal No. 429 of 1968

Kandho Sethi and Others

APPELLANT

Vs

Kau Kalu Padhan and Others

RESPONDENT

Date of Decision : 17-04-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4
Criminal Procedure Code, 1898 (CrPC) — Section 133

Citation : (1972) 38 CLT 667

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : N.V. Ramdas, for the Appellant; B.K. Pal, for the Respondent

Judgement

R.N. Misra, J.—The Plaintiffs are in appeal against the reversing decision of the learned Additional Subordinate judge, Berhampur. They sued in the representative capacity for themselves and on behalf of the villagers of Bijepur excluding Defendants 9 to 13 who are in league with the Defendants, for a decree for permanent injunction restraining the Defendants from digging any water passage to divert the water of the natural stream. It was alleged by them that the lands described in the suit were lying towards the east of village Bijepur. On the south of the property there follows the natural stream. On the north lies the rain-fed block of lands of village Kondho Bijepur which is a different village from that of the Plaintiffs. Defendants 1 to 5 were previously of Bijepur but later shifted to Kondho Bijepur. In 1958 Defendants 1 to 3 forcibly dug a nullah through the disputed property from south to north with a view to diverting the natural stream to the lands which they acquired in Kandho Bijepur. The diverted nullah obstructed the free movements of the cattle of the village and deprived the villagers of the use of the grazing field. The revenue authorities directed the Defendants to remove the obstruction. There was a proceeding u/s 133 of the Code of Criminal Procedure. The criminal proceeding was settled and the artificial nullah was abandoned. In due course on account of rains it got filled up. The Plaintiffs came to Court on the ground that the Defendants belonging to village

Kondho Bijepur with assistance of Defendant No. 9 who is the ex-village Karnam of the Plaintiff's village and with the assistance of Defendants 10 to 13 are again out to dig a channel. It was specifically pleaded in paragraph 8 that Defendants 1 to 5 with the assistance of their relations Defendants 6 to 8 were about to dig the channel Bond in their unlawful act, the 9th Defendant (ex-village Karnam of the Plaintiffs village) was instigating Defendants 10 to 13 his henchmen to support Defendants 1 to 5. The Plaintiffs, therefore, wanted permanent injunction.

2. Defendants 1 to 3 filed the main written statement denying all the allegations in the plaint. They also contended that the other Defendants had no interest in the property and were unnecessary parties to the litigation. It was further contended that the property had vested in Government in 1953 under the provisions of the Orissa Estates Abolition Act and as such the Plaintiffs had no right to bring the suit. Defendants 5 to 12 adopted the written statement of Defendants 1 to 3. In paragraph 2, they stated:

That these Defendants have no manner of interest in the suit plot and as such it is false to allege that these Defendants had ever helped the other Defendants 1 to 3.

The Collector of Ganjam was added as Defendant No. 15 and he came forward with a written statement to support the plea raised by the Plaintiffs.

3. The learned trial judge found that the disputed land was communal in character and the villagers of Bijepur had the right of user. He further found that the Defendants had no right to divert the water from the reservoir to their own lands through the disputed property. The compromise in Ext. C-1 in the criminal proceeding u/s 133 of the Code of Criminal Procedure was not binding on the Plaintiffs. The Defendants were therefore, liable to be restrained from digging the nullah. He accordingly decreed the suit.

4. The learned Additional Subordinate judge upon appeal by the Defendants 1 to 3 found that the channel was in existence over the disputed property for quite some time and the Plaintiffs were, therefore, not entitled to restrain the Defendants from digging the channel. He set aside the finding that the lands were communal in character and accordingly held that the Plaintiffs were not entitled to maintain the action. Accordingly the decree of the trial Court was reversed and the suit was dismissed. It is against this reversing decree of the Appellate Court that the Plaintiffs are in second appeal.

5. Mr. Ramdas for the Appellants had three contentions to raise. According to him the entire title appeal had abated because Respondent No. 10 died during the pendency of the appeal and there was no substitution of his legal representatives. It was next contended by him that the finding in the lower Appellate Court that the disputed property was not communal in character is contrary to law. In fact the legal position has not been kept in view and a wrong finding has been reached. The next contention of Mr. Ramdas was that the

evidence on record has not been considered at all in reaching the conclusion and as such, the matter has not been properly disposed of in the lower Appellate Court.

6. Mr. Pal, Respondents' learned Counsel does not dispute the fact that Respondent No. 10 died during the pendency of the title appeal and went unsubstituted. According to him, while the appeal abated against Respondent No. 10, that abatement had no effect on the title appeal. The title appeal was still competent to be disposed of on merits. Respondent No. 10 of the lower Appellate Court was one Tonga Dandasi Podhan. He was also Defendant No. 10 in the suit. In paragraph 8 of the plaint the following assertion had been made:

That Defendants 1 to 5 have now left Bijepur village and have migrated to Kutumburi Village. The Defendants who had to face the opposition of one and all in this matter of causing obscuration to the grazing of the cattle, have now been able to win over the support of some of the villagers including ex-village Karanam, the 9th Defendant, who is the richest man of the village. This 9th Defendant with his followers Defendants 10 to 13 are instigating Defendants 1 to 5 to reconstruct the nullah over the middle of the suit land on the previous place....

Thus according to the allegations in the plaint, Defendant No. 10 was an instigator of Defendants 1 to 5 at the instance of Defendant No. 9 in the matter of reconstruction of the nullah. Defendants 1 to 3 in their written statement disclaimed any interest of Defendant No. 10 in the property. Defendant No. 10 in the joint written statement of his along with Defendants 5 to 12 disowned any connection with the dispute. He was set ex parte at the trial. The decree of the trial judge ran, thus:

Defendants 1 to 14 are restrained from digging any nullah on the suit land. Defendants 1, 2 and 3 are directed to pay to the Plaintiffs Rs. 55.95 towards costs of the suit.

In the lower Appellate Court, Defendants 1, 8 and 3 were the Appellants and the other Defendants including Defendant No. 10 had been shown as proforma Respondents. In this background it has now to be considered whether the abatement of the title appeal against Respondent No. 10 led to the total abatement of the title appeal. Their Lordships of the Supreme Court in the case of *The State of Punjab Vs. Nathu Ram*, have rightly indicated:

The Code does not provide for the abatement of the appeal against the other Respondents. Courts have held that in certain circumstances, the appeals against the co-Respondents would also abate as a result of the abatement of the appeal against the deceased Respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion in the application of the principle. It will serve no useful purpose to consider the case. Suffice it to say that when Order 22, Rule 4 does not provide for the abatement of the appeal against the co-

Respondents of the deceased Respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and therefore, to be dismissed. Such a result depends on the nature of the relief sought in the appeal.

The point for examination, therefore, is as to whether with the death of Respondent No. 10, the entire title appeal has become incompetent and could not have been proceeded with. The decree in this case as against Respondent No. 10 in the trial Court was one of permanent injunction. According to the case of neither party had the Defendant No. 10 any interest in the property. Injunction was against nuisance. Though Mr. Pal has not been able to show any clear authority to justify his contention that with the death of Respondent No. 10 the cause of action against him died, I have no doubts in my mind that the position is so. Respondent No. 10 was admittedly a person without any possession over the property. Injunction was granted on the footing that he was likely to interfere with the possession of the Plaintiffs. The decree was, therefore, on the footing that Respondent No. 10 was a person without interest and was likely to affect the Plaintiffs right of enjoyment. In the facts and circumstances of such a case, the cause of action cannot survive beyond him. I must, therefore, hold that the decree was such that its operative character terminated with the death of Respondent No. 10 and nothing survived as a consequence whereof the need to bring the legal representatives of Respondent No. 10 upon record could arise. The cause of action against Respondent No. 10 was personal which could abate with his death. The need for substitution under Order 22 of the Code arises on the footing that the cause of action survives against another upon the death of the party. I am satisfied that in the facts of the present case, there was really no need for bringing the legal representatives of Respondent No. 10 on record. The title appeal abated against Respondent No. 10 with his death and non-substitution of legal representatives. But it did not affect the competency of the title appeal. This contention of Mr. Ramdas must therefore, be negatived.

7. In the Courts below there has been no specific issue as to whether the disputed land was communal in character. The learned trial judge raised issue No. 3 to the following effect:

Whether the suit is Gochar land and the only Gochar land of the village?

The learned trial judge came to hold that the disputed property is the only Gochar land for the village of Bijepur. In doing so he relied upon the entry in the record-of rights (Ext. 11) as also in the Adangal (Ext. 10). He also referred to the evidence of d.w. 3 in coming to his conclusion on the point. In several paragraphs of the plaint the communal nature was indicated to be of use as grazing ground. The Collector (Defendant No. 15) took the following stand:

The suit land covered by survey No. 15 of village Bijepur and measuring Ac. 4.59 cents in extent, is gochar or grazing grounds of the cattle, and is recorded as

such in the current record of rights. It is thus a poramboke land vesting in the State Government under section 5 of the Orissa Estates Abolition Act, 1951, with the vesting of the Chikati Estate under the said Act the said village Bijepur being part of the said estate.

Defendants 1 to 5 have no right to dig and construct the nullah in the said land without the previous permission of this Defendant. The said Defendants also have no right to divert the water of the channel flowing by the southern side of the suit land. It will be extremely inconvenient for the cattle of the village to freely graze over the Gochar land, if a nullah is dug across it.

This Defendant in the circumstances supports the Plaintiffs' claim and prays that a decree be passed in terms of the prayer made in the plaint.

The learned Appellate judge has indeed not touched the oral evidence on record at all in reaching his conclusions. He has also not kept in view the presumption arising from the final record-of-rights. There seems to have been confusion in his mind as to what would be the law to be applied to deal with a case of this type. Admittedly the land belonged to Government after the vesting of the estate under the Orissa Act 1 of 1952. The presumption of correctness of the entry arose from the final record. It was open to the lower Appellate Court to embark upon an investigation about the nature of the land keeping in view such a presumption and in a sum total after consideration of the evidence, to find out whether such presumption stood rebutted. The approach to the matter in the lower Appellate Court seems to have been improper. Any decision on a dispute relating to fact without considering relevant materials is not a proper conclusion of the dispute upon fact and does not bind in second appeal. I am satisfied on an analysis of the judgment of the lower Appellate Court that the matter has not been properly dealt with. Litigation between two sets of villagers has been continuing for some time. It is just and proper that the matter should have been considered from the correct standpoint and a final decision should have been reached so that the dispute may not have survived.

8. I would accordingly set aside the decree of the lower Appellate Court and direct that the title appeal shall be redispensed of. The learned Appellate judge shall keep in view the final record-of-rights and the other documentary evidence as also the oral evidence in view and decide as to whether the Plaintiffs have a cause of action and as to whether the compromise previously reached is to bind and/or whether the Plaintiffs are entitled to the relief of injunction against the Defendants as prayed for. The name of Respondent No. 10 shall stand expunged from the record of the title appeal but such explanation shall not affect the appeal. Costs shall abide the result.