

(2006) 08 OHC CK 0011
In the Orissa High Court
Case No : Second Appeal No. 158 of 1983

Kasinath Muduli and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 25-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 41 Rule 9
Orissa Estates Abolition Act, 1951 — Section 39
Transfer of Property Act, 1882 — Section 117

Citation : (2006) 08 OHC CK 0011

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : R.C. Mohanty and R.K. Mohanty, for the Appellant; P.K. Khuntia, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tripathy, J.—Heard further argument and perused the judgment of the Trial Court.

2. Plaintiffs filed Title Suit No. 36 of 1976-1 seeking a decree of declaration of right and title, confirmation of possession and permanent injunction against the Defendants on the ground that the suit property belonging to the ex-intermediary (Sarbarakar) was settled in favour of their transferee Lingaraj Hota as per Order dated 28.09.1974 in Misc. Case No. 1257 of 1968 (Ext. 1) and thereafter they (Plaintiffs) jointly purchased that land under registered sale deed dated 24.01.1976 and took possession of the land and possessed the same asserting right, title and interest. Certified copy of that sale deed is Ext.4. Defendant No. 1, i.e., State of Orissa, taking advantage of the settlement record showing the disputed property as "Anabadi" land (waste land), started making lease of the said land in favour of Defendants No. 2 to 9 for fishery purpose giving rise to the dispute and the cause of action for the suit. Accordingly, Plaintiffs filed the suit for the aforesaid relieves. Defendant No. 1 and also

Defendant Nos. 2 to 9 filed separate written statements, but the plea advanced by them is similar and identical. According to them, the disputed land is a "Saru Nala" and remains waterlogged throughout the year. During summer season water level reduced and the non-water area remains as waste land and used by the surrounding villages as the pasture land, whereas the submerged area is being used by the villagers, besides taking annual lease for fishery purpose. They further pleaded that, notwithstanding the specific direction of the Board of Revenue, Orissa in its order directing the Tahsildar to make an enquiry and to find out if any of the disputed lands is cultivable land and only to settle that with the ex-intermediary, the then Tahsildar, without due and proper enquiry, passed illegal and void order for settlement of land in favour of Lingaraj Hota and that the ex-Sarbarakar or any of the transferees including Lingaraj Hota and the Plaintiffs never remained in possession of the suit land.

3. Be that as it may, since the disputed property is a "Jala Patta" (waste land), the provision of O.A. Act for settlement could not have adhered to and, above all, the settlement authorities after verification and consideration of fact situation, recorded the suit land as "Anabadi" land and the State Government made annual lease of the water for fishery purpose. With such pleadings, the Defendant prayed to dismiss the suit.

4. Trial Court as well as the Appellate Court dismissed the suit finding no right, title, interest or possession with Lingaraj Hota to be alienated in favour of the Plaintiffs and that Defendant No. 1 is in possession with its right and leasing out the water sources for fishery purpose by annual lease. The Court below, however, recorded that the disputed land is communal land. Plaintiffs have thus filed this second appeal challenging the aforesaid judgment of the Courts below. On 21.09.1983 the second appeal was admitted for determination of the following as the substantial question of law.

1. Whether the Courts below were justified in ignoring the order as per Ext. 1 dated 28.09.1974 recognizing the tenancy right of the original lessee, in view of the bar contained in Section 39 of the Orissa Estate, Abolition Act?

2. Whether the Courts below were justified in holding that the ex-intermediary (P.W.2) was not competent to lease the suit lands? And

3. Whether the Learned Lower Appellate Court committed an error of law in holding that the lease was invalid on account of non-registration ignoring the provisions contained in Section 117 of the Transfer of Property Act ?

4.(Sic) It appears on record that the Appellant No. 1 died on 22.02.1991 during pendency of this appeal and no step for substitution of his legal representatives has been taken. No application has been filed that the deceased-Appellant No. 1 has no legal heir succeeded to his interest or that right to sue survives with the remaining Appellants. Therefore, as indicated in order No. 57, both the parties were heard, if the appeal abates as a whole or in part.

5. Learned Counsel for the Appellants argues that in absence of any instruction from the L.R. of Appellant No. 1 or the remaining Appellants, the fact situation remains that Appellant No. 1 has died and his legal representatives have not been brought on record even if the statutory period expired long back. He further argues that since Appellant No. 1 has 1/3rd interest over the property, which was purchased under registered sale deed dated 24.01.1976, therefore, the appeal shall abate in part in respect of his interest. On the other hand, Mr. Khuntia, Learned Addl. Govt. Advocate and Mr. Mohanty, Learned Counsel for Respondent Nos. 2 to 9 argued that in view of the plea advanced, status of the Plaintiffs amongst themselves is of tenants in common and legal representatives of one of such tenants having not been substituted, the appeal abates as a whole, because the decree is not divisible. In that context, they rely on the ratio in the case of Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others, . In the said decision, Hon"ble Apex Court has held that the provision under Order 41 Rule 4 CPC does not over-ride the provision in Order 22 Rule 9, and when the decree is indivisible, on the death of one of the Appellants, the appeal abates.

6. In view of that settled position of law in this case, the appeal abates because of the aforesaid fact situation and, accordingly, the Second Appeal is dismissed being abated.

Second Appeal dismissed