

(1957) 12 OHC CK 0002
In the Orissa High Court
Case No : Second Appeal No. 294 of 1953

Kora Rana

APPELLANT

Vs

Saibo Behera and Others

RESPONDENT

Date of Decision : 04-12-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33

Citation : AIR 1958 Ori 81 : (1958) 24 CLT 207

Hon'ble Judges : Narasimham, C.J;G.C. Das, J

Bench : Division Bench

Advocate : M.S. Rao and M.K.C. Rao, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

G.C. Das, J.—This is a defendants' appeal directed against an appellate decree passed by the learned Subordinate Judge, Berhampur, in Title Appeal No. 36 of 1951, allowing the plaintiff to recover full possession of the suit-properties from the defendants, and to realise past mesne profits, as decreed by the learned Munsif.

2. The plaintiff commenced a suit (Title suit No. 114/49) for recovery of possession of the disputed properties after evicting the defendants therefrom. The plaintiff's case was that he purchased the suit properties by a registered deed of sale on 2-11-1936, and sometime thereafter left for Burma. He returned from Rangoon in the year 1949, to find the defendants in possession of the said land and they would not vacate in spite of his repeated demands.

He sent a registered notice to the defendants calling upon them to deliver possession of the suit-lands with mesne profits. To this notice, the first defendant's reply was that he had purchased the suit-lands from Champa Beherani and Abhimanyu Behera and thereafter he had sold them to the second and the third defendants and that he was in possession thereof as their tenant. The plaintiff's case therefore was that neither Champa Beherani nor Abhimanyu

had any right to sell the suit-lands; Champa being the widow of his separated brother and Abhimanyu being her son. Thus, he contended that the sale by Champa and Abhimanyu was not binding upon him, and that since the defendant-1 had not acquired any title under the impugned sale-deed, defendants 2 and 3 cannot derive any higher right than that of the defendant 1.

3. The defence, *inter alia*, was that after the death of the plaintiff's brother Gobardhan Behera, the plaintiff married his widow Champa and left for Rangoon about two years after his purchase of the suit-scheduled properties.

He was not heard of until 1949. The defence case further was that the plaintiff never sent any money to Champa for her and her son's maintenance. Thus, Champa and Abhimanyu had the compelling necessity to alienate the suit-properties. The defendants also took a defence that Champa and Abhimanyu represented the entire interest in the suit-properties since the plaintiff had suffered a legal death being unheard of for more than seven years in Rangoon. Accordingly the 1st. defendant had acquired valid title to the suit-properties and he had subsequently sold them to the second and the third defendants who are owners thereof in their own title. Thus, under the circumstances, the defendants are not liable to pay any mesne profits.

4. On these pleadings the trial judge came to the finding that Champa was the wife of the plaintiff and that Abhimanyu was his son through her. The main finding by the trial judge which was the basis of his decree was that the suit-properties were joint family properties and that there was no legal necessity to justify the sale. On these findings, the learned trial judge decreed the plaintiff's suit in part and directed the plaintiff to recover joint possession of the suit lands in respect of his half interest and also to recover Rs. 98-4-0 towards the past mesne profits.

5. The plaintiff apparently seems to have been satisfied with the above decree. The defendants, however, preferred an appeal before the District Judge, Berhampur, against that part of the decree by which they were aggrieved. It may be mentioned here that there was no cross-appeal or objection filed by the plaintiff in respect of that part of the decree which was against him. The appeal was ultimately heard by the learned Subordinate Judge, Berhampur, who concurred with the findings of the trial Judge that there was no legal necessity for the sale. The court of appeal further came to the finding that Champa Beherani not being a coparcener of the joint family, could not be the manager thereof during the absence of the plaintiff, and hence she could not sell the suit-properties to the 1st defendant as a manager of the joint family.

Although there was no cross-appeal or cross-objection, the court of appeal below proceeded to consider the question whether the suit-properties were the self-acquired properties of the plaintiff. On a consideration of the facts & circumstances, he eventually, came to the conclusion that they were the self-acquired properties of the plaintiff and hence the sale was absolutely invalid, and

decreed the plaintiff's suit in full, and directed him to recover possession of the 16 annas interest in the suit-properties. He also confirmed the order for the recovery of past mesne profits. Against this appellate decree, the present second appeal has been filed by the 1st defendant.

6. After the filing of this appeal, the Taxing Officer of this Court found that the plaintiff had valued the suit at Rs. 211-10-0 only on the ground that so far as the prayer for possession is concerned, the court-fee payable is 15 times of the annual rental of the disputed properties, and Rs. 196/- was claimed as mesne profits for three years and accordingly, he paid court-fee on Rs. 211-10-0 on the plaint. The defendant before the lower appellate Court valued the appeal at half the above valuation and paid ad valorem court-fee thereon. The Taxing Officer, however, found that the suit is not one for possession, pure and simple, but is a suit for title and possession; in other words, the suit was for declaration of title with consequential relief which is apparent from the averments in the plaint itself.

Accordingly, he came to the conclusion that the suit should have been valued at Rs. 1417-8-0 and directed the appellant to amend the valuation and pay the required court-fee on Rs. 1417-8-0 for this Court and on Rs. 708-12-0 for the appeal in the lower appellate Court, less the amount paid on the memorandum of appeals in the two courts. He also called upon the plaintiff to pay the required court-fee on Rs. 1417-8-0 for the plaint less the amount of court-fee paid by him thereon. The defendant-appellant, accordingly, paid the court-fee as ordered by the Taxing Officer. But the plaintiff-respondent No. 1 did not enter appearance in this Court though notices were duly served on him, and did not pay the excess court-fee.

7. Mr. M.S. Rao raised two contentions in this appeal; (1) The ad valorem court-fee not having been paid on the plaint there was no properly constituted plaint before the Court and that the plaintiff should be non-suited on that ground alone; (2) The appellate court was not justified in exercising his powers under the provisions of Order 41, Rule 33 of the CPC in modifying a part of the decree passed by the trial Judge without any appeal or cross-objection having been preferred by the plaintiff.

8. Mr. Rao, in support of his first contention, relied upon Section 12 of the Court-fees Act, (Act VII of 1870) and contended that the plaintiff having failed to pay the additional court-fee, the suit should be dismissed under paragraph (2) of Section 10 of the Court-fees Act. It appears that there has been certain amendments introduced by the Orissa Legislature to Section 12 of the Court-fees Act. Paragraph (2) of Section 12 is as follows:

"But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of Section 10, paragraph

(ii) shall apply."

Paragraph (ii) of Section 10 is as under-

"In such case the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed."

By Orissa Act (V of 1939), for paragraph (ii) of Section 12 the following paragraph was substituted:

"(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, it shall

(a) in any case in which the decision is to the detriment of revenue, require the party by whom such fee has been paid, to pay so much additional fee as would have been payable had the question been rightly decided and thereafter-

(i) if the party required to pay is the appellant or petitioner, the appeal or petition shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the appeal or petition shall be dismissed.

(ii) If the party required to pay is the respondent or the opposite party, the Court shall fix a date before which such party shall pay the amount of court-fee due from him and if such party fails to pay the fee required before the date fixed by the Court, the Court shall recover the amount of such fee from him as if it were an arrear of land revenue. Where the Court considers that the amount of such fee should be paid to the respondent or the opposite party by the appellant or the petitioner, as the case may be, the Court may provide for such payment in the order as to costs in the said appeal or petition; and

(b) in any case in which the decision is that any excess fee has been levied, direct the refund of so much excess fee to the party who paid it as would not have been payable had the question been rightly decided.

Explanation : For the purpose of this section a question relating to the classification of any suit in regard to Section 7 shall not be deemed to be a question relating to valuation."

9. Thus, in view of the Orissa amendment, the suit cannot be dismissed for non-payment of the excess court fee, but the said fee is recoverable as an arrear of land revenue. It cannot also be held that there was no properly constituted suit before the trial Court. Undoubtedly ad valorem court fee was paid on the valuation as given and explained in the plaint. It was only at the second appellate stage that it was found that the valuation as given in the plaint is not the proper valuation. Accordingly, the first contention of Mr. Rao is bound to fail.

10. Now coming to his second contention, as I have stated earlier, the trial Judge decreed the suit in part and directed the plaintiff to recover joint possession of

the suit-properties in respect of his eight annas interest on the basis that the suit-properties were the joint family properties. It is apparent from the records of the lower appellate Court that neither any cross-appeal nor any objection was filed by the plaintiff-respondent. The lower appellate Court while confirming the decision of the trial Judge with regard to the legal necessity proceeded to consider whether the properties were the self-acquired properties of the plaintiff though no cross-appeal or objection was filed on that behalf. The lower appellate Court thus purported to have exercised its powers under Rule 33, Order 41, C. P. C. Order 41, Rule 33, was introduced for the first time by Section 4 of the CPC (Amendment Act IX of 1922), and was based upon Order 58, Rule 4 of the Rules of the Supreme Court of Judicature in England. The object of the rule, it appears, is to empower the appellate court to do complete justice between the parties. Before the introduction of this Rule, the Courts in order to do justice between the parties were applying the principles of "justice, equity and good conscience". Order 41, Rule 33 as is relevant for the purpose of this case is:

"Rule 33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection".

In order to appreciate the point in controversy it would be pertinent here to quote the provision for the filing of the cross-objection. The relevant provision is Rule 22 of Order 41 and is as follows-

"Rule 22 (1). Any respondent, though he may, not have appealed from any part of the decree, may not only support the decree, on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow".

Doubtless, Rule 33 of Order 41 confers a wide and unlimited jurisdiction on the Court of appeal to pass a decree in favour of a party who has not preferred a cross-appeal or objection; but that does not mean that the other provisions of the Code should be completely abridged or abrogated. Circumstances may arise where the appellate Court in exercise of its powers under Order 41, Rule 33, to do complete justice between the parties, may vary or reverse the decree passed by the trial Court: but the general principle underlying the CPC should always be strictly followed. In support of his contention, Mr. Rao relied upon a decision of the Patna High Court reported in *Bir Singh v. Budhu Ram* AIR 1950 Pat 346 (A). The facts of that case were:

The plaintiffs filed a suit for declaration of title and recovery of possession in respect of 14 kathas and 17 dhurs of land comprised in plot No. 390 situated in village Banuchapra. They alleged that the fruits of some trees on the land were settled with the defendant for five years. After the expiry of the said period in 1939, the plaintiffs got back possession. It was then alleged that there was some structure on the land, namely, a pucca house, a hut, a latrine and a nad. According to the plaintiffs, they constructed the aforesaid structures except the nad which was made by the defendant with the permission of the plaintiff. In 1943, the appellant again wanted to take settlement of the fruits, but the respondents refused.

This led to a proceeding u/s 144, Cr. P. C. as a result of which the respondents were dispossessed, and filed a suit. The defence in that suit was that the defendant had taken settlement of the land in batai from the father of the plaintiff in the year 1928. He alleged that by reason of the said settlement and his continued possession since then, he had acquired a right of occupancy in the land. His case was that he had constructed the pucca house, the hut, the latrine and the nad. The court of first instance held that there was no settlement of the land and the appellant was a trespasser in respect of that land, but a licensee or a tenant at will in respect of the structures.

On these findings, the trial Judge passed a decree in favour of the plaintiff with regard to the land, but held that the plaintiffs were not entitled to recover possession of the land on which the structures stood without asking the appellant to quit the structure or remove them. In other words the trial court passed a modified decree, in favour of the plaintiffs giving them possession of the land other than the land on which the structures, stood. An appeal was carried against this decision by the defendant against that part of the decree of the trial Judge which allowed possession of the land minus the structures. When the appeal was heard by the learned Subordinate Judge, he affirmed the main findings of the trial Court and held that the trial court was wrong in thinking that notice to quit or a demand was necessary before the plaintiffs could succeed in respect of the land on which the structures stood. Undoubtedly, this part of the decree was against the plaintiffs, but they did not prefer any appeal or cross-objection. The learned Subordinate Judge purporting to exercise his power under Rule 33, Order 41 passed the above decree. On appeal, the High Court held that though Order 41, Rule 33 is in very wide terms, it must not be interpreted in such a way as to abrogate the other provisions in the Code with regard to the filing of appeals, cross-objections, etc. As an ordinary rule, an appellate court must not reverse or vary a decree in favour of a party who has not preferred any appeal or cross-objection against it and this general rule should hold good notwithstanding the enactment of Rule 33.

It was further held that the illustration of the rule gives some indication of the class of cases in which Rule 33 will apply: for example, it applies to cases where, as a result of interference in favour of the appellant, further interference with the

decree of the lower Court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. In coming to the above conclusion, their Lordships of the Patna High Court relied upon certain previous decisions of their own Court as well as of the Privy Council; Vide *Panchu Bania Vs. Anand Thakur and Others*, : *Kesho Prasad Singh Vs. Narayan Dayal and Others*, , *Raja Mohan Bikram Shah @ Ram Raja Vs. Deonarain Mahto and Others*, . *Nobin Chandra v. Chandra Madhab* AIR 1916 PC 148 (E); *Muhammad Khaleef v. Les Tanneries Lyonnaises* AIR 1926 PC 34 (F); *Ram Chander v. Dwarka Nath* 5 P LW 213: (AIR 1917 Pat 52) (G) and AIR 1939 86 (Privy Council) . A Full Bench decision of the Madras High Court reported in *S.M.S. Subramanian Chettiar (dead) and Another Vs. Sinnammal and Others*, however, did not meet full approval of their Lordships of the Patna High Court. In a recent decision of the Madras High Court, (J), Mr. Justice Venkatarama Aiyar (as he then was) distinguished the above Full Bench decision of the Madras High Court and held that though Order 41, Rule 33 confers wide and unlimited jurisdiction on Courts to pass a decree in favour of a party who has not preferred any appeal, there are, however, certain well defined principles in accordance with which that jurisdiction should be exercised. Normally, a party who is aggrieved by a decree should, if he seeks to escape from its operation, appeal against it within the time allowed after complying with the requirement of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41, Rule 33.

10a. But there are well recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to readjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible, but is claimed against a number of defendants. In such cases if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory. This, however, is not an exhaustive enumeration of the classes of cases in which courts could interfere under Order 41, Rule 33. Such an enumeration would neither be possible nor even desirable.

11. Keeping the above principles in view, the real question for consideration is what is it that was in controversy between the parties before the court of appeal below. The controversy as it appears was whether the impugned sale was binding on the plaintiff. Both parties took the position that the suit-properties belong to the joint family, the only limited scope in the appeal, therefore, was whether it was binding on the plaintiff or not. It was indeed not necessary, in the absence of any cross-appeal or objection by the plaintiff to enter into a discussion of the question whether or not the suit- properties were the self-acquired properties of the plaintiff.

As has been held by their Lordships of the Patria High Court, the appellate Court has not exercised his powers properly under Rule 33, Order 41. In the absence of any cross-appeal or objection, it was no longer in controversy that the suit properties did not belong to the joint family. Accordingly, the learned Court of appeal below was wrong in assuming jurisdiction under Order 41, Rule 33 and in passing a full decree in favour of the plaintiff. That part of the judgment of the learned Subordinate Judge cannot therefore be upheld.

12. In the result, I would set aside the judgment of the learned Subordinate Judge and allow this appeal and restore the decree of the learned Munsif to the effect that the plaintiff would be entitled to joint possession of the suit-lands in respect of his eight annas interest, and he would also be entitled to recover Rs. 98-4-0 towards the past mesne profits.

13. With regard to the realisation of the excess court-fee, I would direct the Collector of Ganjam to realise the same from the plaintiff Saibo Behera, son of late Giria Behera of village Gouza in the District of Ganjam, as if it were an arrear of land revenue.

14. There being no appearance on behalf of the respondent there would be no order for costs of this Court.

Narasimham, C.J.

15. I agree.