

(2002) 09 OHC CK 0033

In the Orissa High Court

Case No : Second Appeal No. 31 of 1987

Kusasan Samal and Others

APPELLANT

Vs

Chandramani Pradhan (dead) after him Panchei Bewa and Others

RESPONDENT

Date of Decision : 20-09-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8(2), 11, 9
Easements Act, 1882 — Section 28

Citation : AIR 2003 Ori 157

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : R.Ch. Mohanty, R.K. Mohanty and N. Behura, for the Appellant; M. Patra, B. Bramhaachari, U.C. Patnaik, P.C. Deo, S.K. Rai and Ranjit Das for No. 1/ a and D.R. Mohapatra, for Nos. 3, 4, 7, 8, 10 and 11, for the Respondent

Judgement

L. Mohapatra, J.—Some of the defendants are the appellants before this Court against a reversing judgment.

2. Initially the suit had been filed for declaration that the plaintiffs are the owner in possession of A-schedule property which they had purchased under a registered sale deed dated 4-12-1968 and for declaration that neither villagers nor the defendants ever used the suit property as passage for going to the river ghat, for a confirmation of possession and permanent injunction. During pendency of the suit notification under the Consolidation of Holdings and Fragmentation of Land Act was published and accordingly the suit was confined to prayer for permanent injunction only.

2A. Case of the plaintiffs is that Schedule-B property is a part and parcel of Schedule-A property belonging to the plaintiffs 1 and 2 and father of plaintiff No. 3. Plaintiffs 1 and 3 and father of plaintiff No. 3 were the sikimi tenants and after death of father, the plaintiff No. 3 possessed the share of his father and was recognised by the owner as a tenant. In course of time the plaintiffs purchased

property under their occupation from the owner under registered sale deed and became full owner in respect of the said properties. Further case of the plaintiffs is that the disputed properties are Class I lands and though in the rainy season the land gets submerged with water for about 4 to 5 months, during rest of the period the plaintiffs while in actual physical and exclusive possession cultivate the lands. It is pleaded in the plaint that Schedule B property which is a part of Schedule A property was never used as pathway of the villagers or the defendants 1 to 6 for the purpose of going to the river ghat. The settlement authorities on perusal of the sale deeds had recorded the schedule property in the names of the plaintiffs but erroneously mentioned therein that it is a public road in the remark column. The plaintiffs also pleaded that the defendants have no manner of right, title, interest or possession over the suit property and in order to make illegal gain the defendants 4 and 5 started a case u/s 144, Cr. P. C. in respect of the suit land for which the plaintiffs were forced to file the suit for declaration of their right, title, interest and for injunction.

3. Defendants 1 to 6 contested the suit and filed written statement. Their case is that the plaintiffs are not the full owner of the land after they purchased the same in the year 1968 and the land was never being used as "Chasa" land as claimed by the plaintiffs. Specific plea of the defendants is that there is no panchayat road in the village for going to Gobari River Ghat and the villagers including the said defendants used the suit land as passage to go to the river ghat. Since there is no well or tank in the village, the villagers are using the river water for their domestic and drinking purpose and excepting the disputed land there is no other passage or road from the village to the river ghat. Considering the aforesaid fact the settlement authorities though recorded the land in favour of the plaintiffs in the remark column, noted that it was a village road. Against the entries made by the settlement authorities an appeal was filed by the plaintiffs and during pendency of the appeal an Inspector was deputed to inspect the spot and submit report. After considering the report submitted by the Inspector, the appeal was dismissed and the recording in the remark column that the suit land is a public road was upheld. Apart from the aforesaid objection raised in the written statement objection with regard to maintainability of the suit was taken.

4. On the pleadings of the parties the learned Munsif, 2nd Court, Cuttack framed seven issues and dismissed the suit on the following findings:

(i) Since the relief for declaration of title has abated due to notification under the Consolidation of Holdings and Fragmentation of Land Act, the Court cannot adjudicate upon the right and interest of the plaintiffs having regard to the claim of the defendants before granting a decree for permanent injunction.

(ii) Notice under Order 1, Rule 8(2), C.P.C. is not in accordance with law and accordingly the plaintiffs are not entitled for the reliefs claimed having failed to disclose the nature of the suit and the relief claimed in the notice published by way of advertisement.

(iii) Due to non-publication of notice in terms of Order 1, Rule 8(2), C.P.C. the suit is bad for non-joinder of necessary parties.

(iv) The suit land is being used as RASTA and the plaintiffs are not in exclusive possession of the same.

5. Challenging the judgment and decree of the learned Munsif, the plaintiffs carried an appeal before the 1st Addl. District Judge, Cuttack and the said appeal was allowed on the following findings:

(i) Plaintiffs are the owner of the suit land.

(ii) Though in the remark column of the record-of-rights it is mentioned that the land is being used by "Sarbasadharan" the defendants have failed to prove easement of necessity over the same and at best use of the land by the defendants can be termed as permissive and not as a matter of right.

6. At the time of admission of the appeal this Court formulated the following substantial questions of law to be adjudicated at the time of hearing:

(a) Whether the decisions of the learned Courts below can be sustained in law in view of the fact that they have admittedly been passed against a dead person?

(b) Whether the recognition of the appellants' right of way by the consolidation authorities will operate as res judicata between the parties and will be sufficient to refuse the prayer for permanent injunction made by the plaintiffs-respondents 1 to 11 against the appellants, claiming absolute ownership?

(c) Whether the plaintiffs-respondents 1 to 11 are estopped from challenging the appellants' right of way after being unsuccessful on contest before the settlement authority on the same line, vide Ext. F.

7. Referring to the substantial questions of law on which the appeal has been admitted the learned counsel for the appellants submitted that though the suit was brought essentially against villagers, notice under Order 1, Rule 8(2), C.P.C. published at the instance of the plaintiffs did not meet the requirement of law and the defendants 1 to 6 were impleaded in their individual capacity and not as representatives of the villagers. According to the learned counsel, law on the question of notice under Order 1, Rule 8(2), C.P.C. has been well discussed by the learned Munsif and the decision of the learned Munsif in this regard was justified which did not call for any interference by the lower appellate Court. Learned counsel appearing for the respondents, on the other hand, submitted that notice was published in terms of Order 1, Rule 8(2), C.P.C. and the same meet all the requirements of law and the lower appellate Court was therefore justified in reversing the finding of the trial Court in this regard.

In order to appreciate the submissions of the learned counsel for the parties, it is necessary to look into the plaint. In para 8 of the plaint it is alleged that the suit property was never used as pathway by the villagers or defendants 1 to 6 at any point of time for going to and coming from river ghat. In para 10 of the plaint it

is pleaded that there is a public panchayat road in the village for going to and coming from Gobari river ghat and the said road is used by all the villagers Including the defendants 1 to 6 as their passage. In the prayer portion declaration was sought for to the extent that the villagers nor the defendants used the property as passage for going to and coming from the river ghat. In view of such pleading in the plaint and the prayer as indicated above, there is no doubt in mind that the suit had essentially been filed against the villagers and therefore, notice under Order 1, Rule 8(2), C.P.C. was required to be published. As a matter of fact, from the order-sheet it appears that the said notice was published.

8. Now coming to the question as to whether notice indicates all the requirements or not, reference may be made to a decision of this Court in the case of Purna Chandra Panigrahi v. Baidya Jani, reported in (1992) 74 C LT 309. In the said decision this Court held that notice under Order 1, Rule 8(2), C.P.C. is mandatory in nature and is an essential pre-condition for trial of the suit. Notice under the provision must disclose the nature of the suit as well as reliefs claimed therein in order to enable the persons interested to get themselves impleaded as parties to the suit either to support the cause or opposite it. The notice must state about why the suit has been filed and what is the relief claimed therein, and it must also state who are the persons selected to represent the cause. Relevant portion of the judgment is quoted below:

"It is not in dispute and indeed learned Single Judge has accepted the position that notice under Order 1, Rule 8, C.P.C. is of mandatory character. The provisions of Order 1, Rule 8, C.P.C. are mandatory and not directory in nature and notice under Order 1, Rule 8(2), C.P.C. is an essential pre-condition for trial of the suit. This view was succinctly expressed in Harihar Jena and Others Vs. Bhagabat Jena and Others, and Lakhana Nayak and Another Vs. Basudev Swamy and Others, The notice under the provision must disclose the nature of the suit as well as reliefs claimed therein in order to enable the persons interested to get themselves impleaded as parties to the suit either to support the cause or opposite it. The notice must state about why the suit has been filed and what is the relief claimed therein, and it must also state who are the persons selected to represent the cause. The object for which Order 1, Rule 8, C.P.C. has been enacted is really to facilitate the decision of question in which a large body of persons are interested without recourse to ordinary procedure where each individual has to maintain an action by a separate unit. Where there is community of interest amongst numerous persons to avoid expenses, trouble and multiplicity of proceedings, few of them are allowed to represent the whole. In a proceeding for a declaration that a particular institution does not have a hereditary trustee or has one, if the members of Hindu public are neither impleaded, nor the suit framed under Order 1, Rule 8, C.P.C. there can be no adjudication of the question whether the institution is a hereditary or not. It will be futile to declare that the public have no right in the institution without impleading the members of the public under Order 1, Rule 8, C.P.C. A similar

view was expressed by the Patna High Court in *Bihari Pd. Sinha and Others Vs. Mahanth Ramswarath Dass and Another*, relating to a public charitable trust."

In the light of the decision quoted above, I would like to examine the publication which is marked as Ext. 1. The notice which is in vernacular though notified reasons for filing of the suit, does not indicate the plot numbers and other description of the property. The notice also does not indicate name of the persons who were selected to represent the villagers. In view of the above, it can safely be said that the notice under Order 1, Rule 8(2), C.P.C. did not meet the requirement and accordingly was defective.

9. Coming to the second question as to whether recognition of the defendants right of pathway by the consolidation authorities will operate as *res judicata* between the parties, it was contended by the learned counsel for the appellants that it is the consolidation authorities who are entitled to decide the question of right, title and interest of parties in respect of the land and it was within the competency of consolidation authorities to decide as to whether a part of land is being used as pathway or not. Since the consolidation authorities decided the question in favour of the appellants, it was no more open for the Civil Court to adjudicate the same and finding of the consolidation authorities in this regard operate as *res judicata*. Law is well settled that the question of right, title, and interest cannot be decided by the Civil Court in respect of those lands which are covered under consolidation operation and therefore learned Munsif was right in confining the suit to the prayer for injunction only. There is no dispute at the Bar that the consolidation authorities are not competent to grant permanent injunction and therefore so far as prayer with regard to permanent injunction is concerned, the suit was maintainable. Though in a suit for permanent injunction the Court may have to incidentally look into the question on title, the same shall not be a ground for refusal of prayer for permanent injunction. So far as other question with regard to right, title and interest of parties is concerned, finding of the consolidation authorities operated as *res judicata* and the Civil Court has no jurisdiction to decide the same. I, therefore, agree with the lower appellate Court that the suit only for permanent injunction was maintainable.

10. Coming to the third question it was contended by the learned counsel for the appellants that during settlement operation though right of the plaintiffs was recognised, in the remark column, it was noted that the land is being used by "Sarbasadharan" (general public). Said note in the remark column was challenged by the plaintiffs in appeal. During pendency of the appeal an Inspector was deputed to act as Commissioner and submit a report. On the basis of the report submitted by the Inspector the appeal was dismissed and the entry in the R.O.R. with regard to use of the land by the villagers was upheld. Said appellate Court order having not been challenged any further it attained finality. Though such entry cannot be said to be a conclusive proof of the defendants' claim that they were using the land as passage to the river ghat, on examination of the evidence available on record it is found that such a note in the remark

column is supported by ample oral evidence adduced on behalf of the defendants. There is also evidence on record to show that there is no other land available in the village to go to the river ghat and only other passage available is at a distance. The consistent evidence of the defendants being that the suit property was used by the villagers as passage to river ghat, note in the remark column of the R.O.R. in support of the same appears to have been correctly done. 1, therefore, agree with the learned Munsif that the suit land was being used by the villagers as a passage to river ghat. The learned appellate Court rejected the plea of defendants only on the ground that the easement of necessity is neither pleaded nor proved. In this connection, written statement filed by the defendants 1 to 6 may be referred to. In para 8 of the written statement it is specifically pleaded that there is no road from village Kusumpur to the river ghat and the villagers since time of foundation of the village are going through the ridge of the disputed land to the river ghat and corning therefrom. It is also pleaded in the same paragraph that there is no well or tank in the village and the villagers are using the river water for their domestic and drinking purposes. It is also pleaded that except the disputed ridge there is no passage or road of any kind from village to river ghat. In view of such pleading the learned lower appellate Court was wrong in holding that the easement of necessity was not pleaded by the defendants. In view of such pleading in the written statement and the evidence adduced in support of the same as well as the evidence that the only other road available to the river ghat is situate at a distance, I am of the view that the defendants successfully proved the easement of necessity.

11. It was contended by the learned counsel for the appellants that during pendency of the appeal one of the defendants died and no substitution having been made, the appeal abated as a whole and the decree passed by the lower appellate Court is a nullity. I have not gone into the said question in view of the findings arrived at by me in the earlier paragraphs of the judgment. It is also not clear from the plaint as to whether the deceased-defendant was sued in his individual capacity or a representative of the villagers.

12. In view of the discussions made above, the appeal is allowed, judgment and decree of the lower appellate Court are set aside and the judgment and decree of the trial Court are confirmed.