
(1984) 04 OHC CK 0002

In the Orissa High Court

Case No : Second Appeal No. 322 of 1977

Madan Senapati alias Madan Mohan Senapati

APPELLANT

Vs

Surendra Dehury and Others

RESPONDENT

Date of Decision : 30-04-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 1 Rule 8(1), Order 1 Rule 8(2), 80

Citation : (1984) 58 CLT 70

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

Bench : Single Bench

Advocate : P.K. Misra, for the Appellant; S.C. Mohapatra and Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

B.N. Misra, J.—Defendant No. 2 in the suit is the sale Appellant before this Court. Respondents 1 to 5 were Plaintiffs 1 to 5 and Respondents 6 to 11 were Plaintiffs 7 to 12 respectively in the trial court. Respondents 13 and 14 are the legal representatives of Plaintiff No. 6, Khadia Bhoi. The name of Respondent No. 15, widow of the late Khadia Bhoi, has been expunged as per court's order No. 5 dated 2-5-1978. Respondent No. 12, the Collector of Dhenkanal, was Defendant No. 1 in the suit.

2. The Plaintiffs filed Title Suit No. 26 of 1972 in the court of the Munsif. Angul in a representative capacity. Plaintiffs 1 and 2 belong to villages Chhendipada. Plaintiffs 3 to 12 belong to villages Dahibara, Gohirapasi, Bahalasahl, Languli. Golagadia, Mamuriasahi, Sapeinah, Pedapada, Machhakuta and Tentulei respectively. The case of the Plaintiffs may be briefly noted. In Mouza Chhendipada there is a public deity known as "Hingula Devi". The Bijesthali, of Hingula Devi is situated at a short distance from the suit plot No. 6079 appertaining to Khata No. 762/103 of Mouza Chhendipada. From time immemorial every year in the month of Chaitra the villagers hold a festival of

Hingula Devi over the suit plot and thousands of villagers from nearby villages partake in the festival. Defendant No. 2, who belongs to Chhendipada, was working as a Chowkidar for over thirty years in the Revenue Inspection Bangalow at Chhendipada. Taking advantage of his position, Defendant No. 2 surreptitiously and fraudulently got a lease deed executed by the State in his favour in respect of 20 decimals of land bearing plot No. 6079/6368 from out of suit plot No. 6079 appertaining to Khata No. 762/103. Defendant No. 2 has got his name recorded in respect of the said 20 decimals of land. The villagers were completely ignorant of any lease over the suit plot in favour of Defendant No. 2 and they came to know about the fraudulent lease only when about six months prior to the filing of the suit Defendant No. 2 began making arrangements for constructing a building on the said land. The villagers including some of the Plaintiffs filed protest petitions before the Subdivisional Officer and had also served a pleader's notice on Defendant No. 2. However, as there was no response, a notice u/s 80, CPC was served on Defendant No. 1 and thereafter the present suit was filed. The Plaintiffs have also alleged that on account of the encroachment and construction of the budding by Defendant No. 2 the villagers now find it difficult and inconvenient to hold any festival of the public deity, Hingula Devi. Accordingly, they have prayed for declaration of their right and recovery of possession of the 20 decimals of land leased to Defendant No. 2, for permanent injunction against the Defendants and for mandatory injunction against Defendant No. 2 for demolition of the house constructed on the said land.

3. The State of Orissa represented by the Collector of Dhenkanal, Defendant No. 1 filed its written statement denying the plaint allegations. It is stated that the notice u/s 80, CPC is defective and illegal. The suit is barred by uncertainty of the area over which customary right is claimed by the Plaintiffs. The suit is barred by limitation. Hingula Devi is located in Mouza Chhendipada, but the said deity is not a public institution, nor is it installed on the suit plot. Hingula Thakurani Mandap is situated on a portion of plot No. 6084 which belongs to the State Government and is recorded in its name. A festival of the deity is held but it is neither a big festival nor is it held in the month of Chaitra. It is denied that the festival is held on the entire suit plot since time immemorial. The claim of customary right over the entire suit plot is false and fabricated. The suit plot is recorded in the name of the State, but the allegation that it is utilised for public purposes since time immemorial is false. It is denied that Defendant No. 2 fraudulently got a lease deed executed in respect of a portion of the suit plot in his favour. It is stated that in the year 1967 an area of Ac.0.20 decimals out of plot No. 6079 was leased to Defendant No. 2 for homestead purpose. Before grant of lease general notice was duly served inviting public objection and the opinion of the Gram Panchayat was also called for. No objection was received. The Sarpanch gave in writing on 6-11-1966 that there would be no public objection if the lease was granted in favour of Defendant No. 2. As such the lease was sanctioned of and after due payment by Defendant No. 2. Patta was issued in his favour in the year 1969. Other portions from the same plot No. 6079 have

also been leased out to two different persons. Defendant No. 2 has constructed a pucca building over the leased plot and is in possession of the same. The villagers had filed a petition before the Subdivisional Officer, Angul on 15-4-1971 objecting to the lease granted to Defendant No. 2, but they had not claimed any customary right over the said land. The Subdivisional Officer after due enquiry came to the conclusion that the lease in favour of Defendant No. 2 was valid. None of the officers or staff had committed any fraud in respect of the lease in favour of Defendant No. 2. The lease is legal and valid. Defendant No. 1 has accordingly prayed that the suit should be dismissed with compensatory costs.

4. In his separate written statement, Defendant No. 2 has denied all the plaint allegations. It is stated that the procedure prescribed in Order 1, Rule 8, CPC has not been followed and as such the suit is not maintainable. The suit is also bad for nonjoinder and mis-joinder of parties. It is denied that any Chaitra festival of Hingula Devi is held over the suit plot and that a large number of people attend the said festival every year. The claim of customary right by the Plaintiffs is denied. It is also denied that Defendant No. 2 had fraudulently managed to get the lease deed executed in his favour in respect of 20 decimals of land appertaining to plot No. 6079. It is stated that the lease was granted to him after due compliance with the requirements of law and that the said lease is perfectly valid and legal. Defendant No. 2 has constructed a house on the land leased to him and is staying there with his family to the knowledge of the Plaintiffs and other villagers. Defendant No. 2 has accordingly prayed that the suit should be dismissed with exemplary costs.

5. The learned Munsif who tried the suit found that Defendant No. 2 had fraudulently obtained the lease of the disputed land and that the Plaintiffs had acquired customary right to perform the Jatra over the suit plot, but he dismissed the suit on the ground that the notice u/s 80, CPC was defective and that the provisions of Order 1, Rule 8, CPC had not been complied with. The Plaintiffs, except Plaintiff No. 6 (the late Khadia Bhoi), filed Title Appeal No. 5 of 1976 against the judgment and decree of the learned Munsif. The legal representatives of the late Khadia Bhoi were Respondents, 3, 4 and 5 in the lower appellate court. By his judgment dated 3-9-1977, the learned Subordinate Judge, Angul allowed the appeal on contest without costs against Defendants 1 and 2 and ex-parte against the rest. The Plaintiffs' suit was decreed and their right to hold the Jatra of deity Hingula Devi every year in the month of Chaitra on the suit land was declared, Defendant No. 2 was permanently restrained from interfering with the rights of the Plaintiffs and Defendant No. 2 was further directed to remove the house built by him on the suit land within one month from the date of the judgment, failing which the Plaintiffs were permitted to get the structure removed through court at the cost of Defendant No. 2. The learned lower appellate Court confirmed the findings of the learned Munsif that Defendant No. 2 had obtained the lease of the suit land by collusion and fraud and that the villagers of Chhendipada had acquired customary right on the entire suit plot including the suit land, but differing with the learned Munsif he held that

the State was not a necessary party to the present suit and that the suit was not bad for defect of notice u/s 80, CPC or for non-joinder of necessary parties or for non-compliance with the provisions of Order 1, Rule 8, Code of Civil Procedure. Against the aforesaid judgment and decree of the learned lower appellate court, Defendant No. 2 has filed the present appeal.

6. Admittedly, the present suit was filed in a representative capacity by the Plaintiffs under the provisions of Order 1, Rule 8, Code of Civil Procedure. Mr. P.K. Misra, learned Counsel appearing for the Appellant, has urged that the judgment of the lower appellate court must be set aside as the mandatory provisions of Order 1, Rule 8, CPC have not been complied with in this case as was rightly found by the trial court Mr. S.C. Mohapatra, appearing on behalf at the Plaintiffs, has, on the other hand, submitted that the requirement of Order 1, Rule 8, CPC had been duly complied with as found by the learned lower appellate court and as such the judgment and decree of that court should not be set aside on that ground. This point requires careful examination.

7. Order 1, Rule 8, CPC deals with what are known as representative suits. To avoid conflicting decisions and multiplicity of proceedings when there are numerous persons having the same interest in a suit, one or more of them may, with the permission of the court, sue or be sued or defend in such suit on behalf of others also. This provision formulates an exception to the general principle that all persons interested in a suit shall be parties thereto.

8. In *Udayanath Das v. Lingaraj Moharana and Ors.* it was held by this Court that the provision contained in Order 1, Rule 8, CPC was mandatory and not merely directory and was an essential pre-condition for the trial of the case as a representative suit. In *Laxminarayan " Laxmidhar Behera and Ors. v. Tahatul Masjid represented by Sk. Ahmadullah and Ors.,* it was held:

...Order 1, Rule 8(1), CPC provides that where there are numerous persons having the same interest in one suit, one or more of such persons may with permission of the Court institute a suit on behalf of all the rest of the persons having the same interest as the person or persons suing. Under Sub-rule (2) of the aforesaid rule, when the court grants permission to some person or persons to sue in a representative capacity, it shall, at the Plaintiff's expense, give notice of the institution of the suit to all persons of the number of persons such service is not practicable, by public advertisement. It is now, well settled that notice by public advertisement must disclose the nature of the suit as well as the 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 to defend against it. These requirements are mandatory in nature and non-compliance with anyone of them vitiates the decree....

In *Radhamohan Malia and Anr. v. Basudeb Khuntia and Ors.,* it was held:

I have already held that the trial Court had not passed any orders as to the mode according to which notice was to be served. From the service report, it appears

that the peon, on identification of one of the Plaintiffs, declared the contents of the notice to the persons present and the persons who came there only. From the notice issued there is no mention as to what is the nature of "injunction. In the notice it is only mentioned that the Plaintiffs have filed the suit for permanent injunction only and damage. There was no mention as to from what the Defendants would be restrained. Law requires that in a suit in the representative capacity when notice is to be served on a number of persons, the Court according to the circumstances of the case has to pass orders whether the notice should be served personally on the Defendants or it should be advertised in a way so as the concerned persons who are deemed to be Defendants should have knowledge of the claim. They must have the knowledge about which the suit has been filed and the relief claimed as against them. It has been held by Privy Council in AIR 1933 183 (Privy Council) , that the procedure prescribed by Order 1, Rule 8, Code of CPC is mandatory and if all the persons interested are to be bound by the decision in such a case, provision of Order 1, Rule 8 must be strictly complied with. The reason for this is that any decision given in the case operates as res judicata not only against the persons who are actually before the court but also against those whom they were permitted to represent. Therefore, it follows that the issue of a proper notice and its service either personally, or by a public advertisement on the person concerned is an indispensable peremptory to the trial of the suit under Order 1, Rule 8, Code of Civil Procedure. Breach of this provision is calculated to affect the decision of the case on merits and may be fought with serious consequences. Relying on the Privy Council decision and another decision of the Allahabad High Court Shyam Lal Vs. Musammat Lalli and Another, this Court in Brundabati Thakurani and Ors. v. Hari Biswaland Ors. (1975) (1) C.W. 699 has held that Order 1, Rule 8, Code of CPC contains an exception to the generally that all persons interested in a suit ought to be made parties thereto, but to attract its application, it is essential that the conditions laid down therein must be strictly complied with. In paragraph 10 of the judgment this Court has observed that the provisions of the section as to the issue of notice are undoubtedly peremptory and the Court was therefore bound to issue notice as required by the rule. If the Court omitted to issue notice it committed an irregularity and a grave irregularity which might be remedied by the appellate court sending back the case to the court of first instance to comply with the requirements of the law.

9. In the present case, the Plaintiffs filed the present suit on behalf of the villagers of the eleven villages noted in the plaint. From the order-sheet dated 5-12-1972 of the trial court, it appears that the Plaintiffs were directed to file requisites for issue of summons against the Defendants and also for publication of the notice under Order 1, Rule 8, CPC in daily newspapers. The following order was passed on the next date:

12 12-1972: Notice Under Order 1, Rule 8, CPC filed. Other requisites are in record. Issue notice Under Order 1, Rule 8, CPC for publication in the daily Samaja and issue summons to the defts. through court as well as by regd. post

fixing 12-1-1973 for S.R.

The order-sheet of the trial court shows that the matter of publication of the notice under Order 1, Rule 8, CPC as directed by it did not engage the attention of the trial court at any time thereafter until the suit was heard. In this Court, learned Counsel for the Plaintiffs has filed a copy of the publication in the daily Samaja dated 14-12-1973 wherein the notice under Order 1, Rule 8, CPC had been published. By the date of publication of the notice on 14-12-1973, the trial court had already settled the issues in the suit on 8-9-1973. It was not correct for the trial court to settle the issues before recording its satisfaction that the notice under Order 1, Rule 8, CPC had been duly published and that no represented person had applied to be made a party to the suit. In the notice it is mentioned that the Plaintiffs had filed a suit for declaration of their right and for permanent injunction against the Defendants. There was no mention of any claim of mandatory injunction against Defendant No. 2 although the prayer in the plaint filed by the Plaintiffs includes a prayer for mandatory Injunction against Defendant No. 2 with a direction to remove the house constructed by him on the suit-land. This significant omission in the notice seems to have escaped the notice of both the courts below. The trial court without any consideration of the facts of the present case jumped to the conclusion that as contended on behalf of the Defendants the provisions at Order 1, Rule 8, CPC had not been complied with. The judgment of the lower appellate court also does not show that the facts of the present case were considered by it before coming to the conclusion that the provisions of Order 1, Rule 8, CPC had been complied with. In para-15 of its judgment while discussing the implication of the notice u/s 80, Code of Civil Procedure, the learned lower appellate court has observed that the present suit has been filed by Plaintiff No. 1 representing the people of Chhendipada with due permission of the court. In the absence of any discussion on the point. It cannot be said that the facts with regard to the compliance with the provisions of Order 1, Rule 8, CPC were considered by the learned lower appellate court. Further, while granting the prayer of the Plaintiffs for mandatory injunction against Defendant No. 2, the learned lower appellate court lost sight of the fact that the relief for mandatory injunction was not notified in the publication in the daily Samaja dated 14-12-1973. Before granting the said relief it was incumbent on the learned lower appellate court to consider whether the relief could be granted when it had not been included in the publication. Apparently, the courts below have failed to apply their minds to this important aspect of the case. On the aforesaid analysis, it is necessary in the interest of justice that the suit should go back to the trial court for fresh disposal according to law from the stage of issuing proper notice under Order 1, Rule 8, Code of Civil Procedure. In these circumstances, it is not proper to express any opinion on the other points raised in this appeal.

10. In the result, this appeal is allowed. The judgments and decrees of the courts below are set aside. The suit is remanded to the trial court for issue of notice provided for under Order 1, Rule 8, CPC and to proceed with the suit from that

stage in accordance with law. Costs will abide the event.

11. 25th June, 1984 is fixed for the appearance of the parties before the trial court for the purpose of receiving directions of that court as to further proceedings in the suit. The lower court records be sent back immediately.