

(1995) 07 OHC CK 0016
In the Orissa High Court
Case No : S.A. No. 176 of 1982

Mangala Khada and Others

APPELLANT

Vs

Guru Adhari and after him, Mukta Adhari and Others

RESPONDENT

Date of Decision : 17-07-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 1 Rule 9, Order 6 Rule 17, 99

Citation : (1995) 2 OLR 342

Hon'ble Judges : D.M. Patnaik, J

Bench : Single Bench

Advocate : B.L.N. Swamy, for the Appellant; J. Patnaik and B.B. Ray, for the Respondent

Final Decision : Dismissed

Judgement

D.M. Patnaik, J.—The point for decision is, whether a son living jointly with his father can avoid an ex parte decree for title and possession against his father on the ground that the property involved being ancestral property, the decree was not binding on him.

2. Earlier Title Suit No. 43 of 1972 was filed by present defendant No. 1 against the father and uncles of the present plaintiffs who were defendants 2 to 4 in that suit. Though they filed joint written statement, yet thereafter, remained absent and ultimately an ex parte decree was passed. A misc. case under Order 9, Rule 13, CPC to set aside the ex parts decree was also dismissed for default. The matter was not thereafter taken up before any higher forum. The decree was executed and delivery of possession was given to the plaintiff in the suit in Execution Case No. 314 of 1974 of the Court of Subordinate Judge, Jeypore.

Present plaintiff No. 1 (son of defendant No. 2 in the earlier suit) has come up with the present suit for a declaration that the decree in the earlier suit is not binding on him since it was the result of collusion between the plaintiff and the defendants. He also seeks for delivery of possession of the land after evicting the

defendants therefrom in the present case.

3. Defendant No. 1 alone filed a written statement and contended the case denying the material facts pleaded in the case. He further pleaded that the suit property was not the ancestral property of the plaintiff nor his father (defendant No. 2) and his co-sharers had any interest in the property nor they possessed the same at any time.

4. The lower Court decreed the plaintiff's suit on the finding that in the earlier suit there was no specific finding on the issues framed. Secondly, the property being the joint family property, the present plaintiff having not been a party, the decree was not binding. The lower appellate Court reversed the above finding that the plaintiffs failed to prove either fraud or collusion for setting aside the ex parte decree and secondly the property was not the ancestral property in the hands of defendant No. 2 in that suit (plaintiff's father) and therefore, the present plaintiffs could not claim for setting aside the decree on the ground that it was the ancestral property.

5. Two substantial questions were raised by Mr. B.L.N. Swamy, learned counsel for the appellants. They are:

(1) The lower appellate Court committed error in not holding that the appeal as a whole had abated against the respondents because of non-impletion of plaintiff No. 8 as one of the respondents in the appeal; and

(2) That the present suit would not be barred by the principles of res judicata since no finding has been given with regard to the rights of the parties in respect of the suit property and even if such finding has been given, they are based on no evidence.

Mr. B.N. Ray, learned counsel for the respondents, on the other hand, relying on the decision reported in 1971 (1) CWR 867, Prafullamani Dei and Anr. v. Sadhu Dei and Anr., submitted that as has been held by the lower appellate Court, the plaintiffs having failed to prove fraud and collusion cannot now seek for setting aside the earlier decree even though it is an ex parte decree.

The rival contentions need examination.

6. Mr. Swamy, learned counsel for the appellants, strenuously urged relying on the decisions reported in 51 (1981) CLT 827, Amitav Ray v. Ashok Kumar Ray and Anr., and The State of Punjab Vs. Nathu Ram, , that the plaintiffs had filed the suit for declaration of right title and recovery of possession, and the lower Court decreed the plaintiffs' suit. Therefore, when the present respondent No. 1 in the lower appellate Court did not implead plaintiff No. 8 as the respondent, the whole appeal abated and the lower appellate Court should have dismissed the appeal for such non-impletion.

It is not a question of abatement for non-substitution of the legal representatives. On the other hand, this is a case of non-impletion of party.

There is no dispute with the legal proposition as laid down by this Court and Apex Court in the decisions referred to by Mr. Swamy. But the question is, whether the appellant should be allowed to raise such a plea at this stage for the first time.

7. There is no doubt with the proposition that whether the appeal has either abated far non-substitution of the legal representatives of a deceased party or the appeal stood defeated on account of the non-impletion of plaintiff No. 8 as a respondents a question of law and can be raised even in the second appeal. But it cannot be so done always as has been held by the Supreme Court in the case of Gauri Shanker Vs. Hindustan Trust (Pvt.) Ltd. and Others, . It has been Held in para 7 of the judgment that in permitting a party to raise the plea of non-joinder of parties in the second appeal, the Court, should exercise proper and judicial discretion and consider whether such a point can be permitted to be agitated when it has been either canceled or abandoned in the Courts below. It has been further held that a mere raising a ground in the memorandum of appeal is not sufficient to show that a particular point was actually argued or placed before the Court and that if the Court expressly says that only certain points have been argued and no other point has been argued the statement in the judgment has prima facie to be accepted as correct.

No doubt the appellants here were the respondents in the lower appellate Court, yet the principle as laid down by the apex Court would also be equally applicable to a respondent. The judgment of the lower appellate Court nowhere indicates that the point that the appeal having been defeated for non-impletion of plaintiff No. 8 as a respondent was either raised and refused or raised but not considered. As has been held by the apex Court, it was necessary for the present appellants to file a proper affidavit preferably of their counsel who had argued the case, along with the memorandum of appeal stating that such a point had in fact been raised.

That plaintiff No. 8 was not impleaded as one of the respondents certainly became known to the respondents when they received the notice in appeal. Even till the date of argument, this was not pointed out to the Court. Therefore, it is legitimate to hold that the point was abandoned.

8. Assuming this could be raised, still it remains for decision if plaintiff No. 8 is a necessary party. It is well settled that necessary party is a person in whose absence the matter in issue can not be decided by the Court nor an effective decree can be passed.

In the present case, the father of the plaintiff and his uncles (defendants 2 to 4 in the earlier suit) claimed the suit property advancing a case of title by adverse possession. Plaintiff No. 8 was a minor being aged 8 years at the time of filing of the suit in 1972. The appeal having been disposed of on 15-2-1982, plaintiff No. 8 still continued to be a minor. His father (respondent No. 10 in the appeal) duly represented the interest of the minor and therefore the minor was not a

necessary party and so the question of the appeal being defeated for non-joinder of plaintiff No. 8 as a respondent did not arise.

The contention of Mr. Swamy is therefore not accepted.

9. It is appropriate at this stage to mention that even in the case of non-impletion of a necessary party the Court should not hasten to dismiss the suit or the appeal, as the case may be, without giving an opportunity to the party concerned to amend either the plaint or the appeal memo to implead a necessary party. It has been held in the case of *Motoi Mia and Others Vs. Abdul Haque and Others*, , that amended provisions of Section 99 and Order 1, Rule 9 of CPC adding the two provisos which make the main provisions inapplicable to necessary parties and provisions of Order 1, Rule 10 (2) and Order 6, Rule 17 of the CPC should be read together and when so done as has been held by the Court, it can be noticed that the purpose of the provisos so added by amendment is not to non-suit the plaintiff if relief can be made available to him by the Court in exercise of its power under Order 1, Rule 10 (2) and Order 6, Rule 17.

In my opinion, the Court rightly held that the two provisos were added for the purpose that no decision should be rendered in any suit in the absence of necessary parties. But they were certainly not meant to affect the substantive procedure laid down in the Code that no suit shall be defeated for non-joinder or misjoinder of parties and such an addition was made, as rightly held, "by way of abundant caution". Therefore, it is desirable and proper that a party should be given an opportunity to add the necessary party.

Therefore, it would cause a great hardship and injustice to treat the appeal as having been defeated or should be treated as dismissed for non-impletion of respondent, particularly when the matter was never raised by the appellants before the lower appellate Court, there-by depriving the appellant in that appeal, of an opportunity to amend the appeal memo by impleading plaintiff No. 8.

10. The next question for consideration is with regard to the principle of *res judicata*. It does not need a detailed discussion of the settled principle laid down by the authoritative decisions of the apex Court. Suffice to say that the decision in *Title Suit No. 43 of 1972* has become final even though judgment may be wrong. There is no doubt that a suit can be maintainable to set aside an *ex parte* decree but that is only on the ground of fraud or collusion and on no other ground [vide decision 52 (1981) CLT 306].

In the present case the plaintiffs came forward with a case that their father, who was defendant No. 2 in the earlier suit, colluded with the plaintiff and did not take any steps for which defendants 2 to 4 in that suit were set *ex parte* and for that reason the present plaintiff who claimed the suit property as the ancestral property was not duly represented. No fraud or collusion has been proved. Rather it is found from the judgment of the lower Court that a restoration petition was filed on the ground that the father of the plaintiffs could not appear on the date of hearing of the suit because of his illness. Therefore, the plaintiffs

failed to prove that the ex parte decree was on account of any fraud or collusion. The contention of Mr. Swamy is therefore not accepted.

11. So far as the point that the ex parte decree is not binding is concerned, this fact has been dealt with in para 7 of the judgment of the learned lower appellate Judge. In giving the reason for not holding the property in question to be the joint family property, the learned appellate Judge mentioned that neither the plaint nor the earlier written statement in Title Suit No. 43 of 1972 (marked Ext. B and Ext. 10) really suggested that defendant No. 2 and his brothers were being sued in a representative character or that they claimed title to the property on behalf of their families. He also considered that in the written statement, defendant No. 2 in para 18 asserted title to the property by adverse possession. Further in paragraphs 8 and 9 of the judgment the learned appellate Judge has dealt with the evidence of the PWs and has held that the evidence of the PWs did not prove the land of DW 2 (father of the plaintiffs) as having come to him on partition and, therefore, it was not a joint property. The reasoning cannot be said to be wholly unacceptable and merely because this Court can take another view, for that alone it would not be proper to reverse that finding. This submission of Mr. Swamy also fails. There being no other point raised by Mr. Swamy, the appeal is devoid of merit.

12. In the result, the second appeal fails and is dismissed. No cost.