

(1975) 08 OHC CK 0024
In the Orissa High Court
Case No : Second Appeal No. 235 of 1972

N. Sowbbagyalakshmi alias Bhagyavati APPELLANT
Vs
Ch. Lakshmikantamma and Others RESPONDENT

Date of Decision : 20-08-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Orissa Land Reforms Act, 1960 — Section 35A

Citation : (1975) 41 CLT 1107

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

Bench : Single Bench

Advocate : Y.S.N. Murty, for the Appellant; H.G. Panda, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—Plaintiff is in appeal against the reversing judgment and decree of the learned Subordinate Judge of Jeypore in a suit for title and recovery of possession together with mense profits.

2. Plaintiff alleged that the disputed property with an area of about 10 acres as described in the plaint was the ancestral property of one Appalanarasimha Raju. He had two sons Narasimha and Ramakrishna. After the two sons died, the properties were divided among the co-sharers including the Plaintiff by metes and bounds and subsequently by registered partition deed, the allotments were affirmed. The disputed properties fen to Plaintiff's share. - Defendant No. 2's father was getting the property cultivated. He died in May, 1964 and the second Defendant started supervising the cultivation on behalf of Plaintiff. In 1966, Defendant No. 1 trespassed into the property and started cultivating the same. On 21-12-1966, the suit was filed.

3. Defendant No. 1 in his written statement challenged the partition and ownership of Plaintiff. He, however, accepted the position that the property belonged to N. Ramakrishna Raju and contended that Ramakrishna had inducted

the Defendant as a tenant on 8-6-1964 and the Defendant was the cultivating tenant in possession. He claimed that he had paid rent to Ramakrishna and in fact when Ramakrishna had refused to issue a receipt, Defendant No. 1 had filed an application before the O.L.R. Officer. During the pendency of the suit, Defendant No. 1 died and his legal representative were brought on record.

4. The learned Trial Judge held that Defendant No. 1 was not a tenant but a trespasser. Even if he was a tenant, with his death, his tenancy has expired and his legal representatives were not entitled to protection. Accordingly he decreed the suit.

5. The lower appellate Court held that Defendant No. 1 was a tenant and not a trespasser and after him his heirs would inherit the property including the status of tenant. Accordingly it reversed the decree and directed the suit to be dismissed. This reversing decree is assailed in second appeal.

6. Mr. Murty for the Appellant takes the stand that conceding Defendant No. 1 to be a bhag chasi, the finding of the lower appellate Court that his heirs would be treated as tenants by application of Section 35-A of the Orissa Land Reforms Act is contrary to law. It is conceded before us that Defendant No. 1 as tenant was entitled to protection during his life time and his legal representatives would not have any right by inheritance unless Section 35-A of the Orissa Land Reforms Act is applicable. That provision runs thus:

The tenant shall, subject to the final orders made in the proceedings, if any, under this Chapter, hold the lands as a tenant with heritable rights until the conclusion of such proceedings and while so holding shall be subject to the provisions contained in Chapter II.

Section 35-A is applicable in respect of a proceeding under Chapter IV. There is no material on record to show that the O.L.R. proceeding referred to by the Defendants as, per Ext. C was a proceeding under Chapter IV. On the other hand there is some evidence to show that Defendant No. 1 had initiated a proceeding under the O.L.R. Act when Ramakrishna had refused to give him a receipt for rent. Therefore, the learned Appellate Judge clearly went wrong in invoking the aid of Section 35-A of the Orissa Land Reforms Act in favour of the Defendants-legal representatives. If the matter rested here, the judgment of the learned Appellate Judge was to be vacated because there is no dispute that a bhag chasi's right is not heritable.

7. Mr. Panda for the Respondents, however, says that Defendant No. 1 who has been adjudged as a tenant by the learned Appellate Judge could not have been asked to be evicted when the suit was filed. Such a suit was not maintainable at all in the Civil Court. As it is settled position in law that while disposing of a suit, rights of parties as then existing would be taken into consideration, the suit has to be dismissed. The legal position may now be examined. The earliest authority which appears never to have been dissented from is the case of *Rai Charan v. Biswanath* AIR 1915 Cal. 103. Sir Asutosh Mookerjee, J. spoke for the Division

Bench thus:

The rule was recognized in *Radhay Koer v. Ajodhya Das* (1908) 7 C.L.J. 262 that a suit must be tried in all its stages on the cause of action as it existed at the date of its commencement. This is in accord with the observation of Lord Kingdown in *Anundomoyee v. Shoob Chunder*, (1861) 9 M.I.A. 287 that in appeal the question is, whether the decision of the Primary Court is correct on the facts as they stood when the judgment was rendered and that no subsequent event of devolution of interest can affect that question, because to give effect to them, should justice require it would be the office, not of an appeal, but of some supplementary proceeding. As illustrations of the general rule, reference may be made to the cases of *Govinda v. Perumdevi* (1889) 12 Mad. 136, *Ramanandan Chetti v. Pulikutti Servai* (1896) 21 Mad. 288, *Wamanrao v. Rustumji* (1897) 21 Bom. 701, and *Raja of Venkatagiri v. Mokku Narasaya* (1910) 71 C. 203. But to his ordinary rule, exceptions have been recognised on grounds fully explained in the case of *Ram Ratan Sahu v. Mohant Sahu* (1907) 6 C.L.J. 74. The decisions in *Sakharam v. Hari Krishna* (1881) 6 Bom. 113, *Sangili v. Mookan* (1893) 16 Mad. 350, *Ahmadjee v. Mahamadjee* (1899) 1 Bom. L.R. 218, *Rustumji v. Purushotamdas* (1901) 25 Bom 606, *Balkishan v. Kishan Lal* (1889) 11 All. 148, *Hazari Mull v. Janaki Prasad* (1907) 6 C.L.J. 92, *Ramyad Satu v. Bindeswari Kumar Upadhyia* (1907) 6 C.L.J. 102, *Udit Chobey v. Rashika Prasad Upadhyia* (1907) 6 C.L.J. 662 *Hedlat Khasia v. Ka_Ran Khasiani* (1912) 131. C. 377, and *Banwari Lal v. Sheo Sankar Misser* (1909) 11. C. 670 show that a Court may take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. This doctrine is of an exceptional character and is applied in cases where it is shown that the original relief claimed has by reason of subsequent change of circumstances become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. A similar view has been taken in England in *Quilter v. Mapleson* (1882) 9 Q.B.D. 672 and *Attorney General v. Birmingham, Tame and Rea District Dramege Board*, (1912) A.C. 788 where the principle was recognized that on appeal such a judgment may be given as ought to be given if the case came at that time before the Court of first instance: d. Order 41. Rule 33, CPC Code, 1908.

This decision has in terms been approved by a later Supreme Court decision as laying down the correct law to which I shall refer later. We propose to deal with a few cases of the different High Courts and of the Supreme Court to indicate what types of cases should be brought within the exception to the general rule.

In the case of *Nuri Miah v. Ambica Singh* AIR 1917 Cal. 716, which follows the principle laid down in the earlier Calcutta decision, Sir Asutosh Mookherjee, J. sitting with Chief Justice Sanderson observed:

... Now, it may be conceded that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this

principle is not of universal application and in a long series of decisions, which will be found reviewed in the case of *Rai Charan Mandal v. Biswanath Mandal* AIR 1915 Ca1. 103, the doctrine has been recognized that there are, cases where it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. The principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is precessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. In my opinion, the case before us falls within this exception to the general rule, and the decree herein should be made in accordance with the circumstances as they stood at the date of the decree of the trial Court, because otherwise the decree if made in conformity with the prayers in the plaint would be inappropriate and would not do complete justice between the parties. This way be well illustrated by a reference to the prayer in the plaint itself. The Plaintiff seeks a declaration of his title to specified shares in the three villages mentioned in the schedule and prays that he may be placed by the Court in possession of such shares. The decree of the District Judge is in strict conformity with these prayers in the plaint.

But it has not been seriously disputed that the decree so awarded to the Plaintiff is -incapable of execution by reason of events which have happened since the institution of the suit. The joint property has, during the pendency of the litigation in the trial Court, become transformed into several separate estates and it is impossible in execution of the decree awarded to the Plaintiff to place him in possession of a share in the joint property as claimed by him in the plaint....

In the case of AIR 1948 1 (Nagpur) , a Division Bench consisting of Vivian Bose, J. (as the learned Judge was then was) and Sen J, observed:

.... The Court, however, may in suitable cases take notice of events which have happened since the institution of the suit and afford relief to the parties on the basis of the altered conditions. This doctrine is of an exceptional character and is applied in cases where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or, that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. If these two principles are borne in mind many of the difficulties raised by Reilly J., in his order of reference in ILR 57 Madras 95, and on which great stress was laid by the learned Counsel for the Appellant can be resolved.

A Full Bench of the Nagpur High Court in the case of *Chhote Khan v. Mohd. Obedulla Khan* AIR 1953 Nag. 361" consisting of Chief Justice Sinha. Hidayatullah and Mudholkar, JJ. (as all the three learned Judges were) came to examine the same question. The majority view clearly indicated that the rights had to be worked out as existing on the date of the decree particularly where change was brought about in the position of the litigants by law.

8. Two Patna decisions may now be referred to case of Bholi Ram Lari and Others Vs. Puri Devi and Others, , it was observed:

It is well settled that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of institution; but this principle is not of universal application and the Court may in appropriate cases depart from this rule and take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made.

In the facts of the case, however, the Court found that the original relief was still available to be granted and it did not become necessary to apply the exception to the general rule.

The self-same question was examined in the next year in the case of Mahipat Missir and Others Vs. Ganpat Sah and Others, . The following observation appearing in paragraph 14 of the judgment is useful to extract:

.... It is well settled that an action must be tried in all its stages on the cause of action as it existed at the commencement of the action. Though an Appellate Court can and must take such action in the light of subsequent events as will shorten litigation, it must preserve the rights of both parties and subserve the ends of justice...

9. I may now refer to some decisions of the Supreme Court. In the case of Surinder Kumar and Others Vs. Gian Chand and Others, , the view expressed by the American Supreme Court in the case of Patterson v. State of Alabama (1934) 294 U.S. 600, has been quoted with approval:

We have frequently held that in the exercise of our appellate jurisdiction we have power not only correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

In the case of Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others, , changed position brought about by the Hindu Succession Act was given effect to. Similarly, in the case of Ram Sarup Vs. Munshi and Others, , changed position brought about by the Amending Punjab Act, 10 of 1960 to the Punjab Preemption Act, 1 of 1913 was given effect to. In the case of Nair Service Society Ltd. Vs. Rev. Father K.C. Alexander and Others, , Hidayatullah, J. (as the learned Judge then was) in clear terms approved the view indicated by Sir Asutosh Mookherjee, J. in Rai Charan v. Biswanath AIR 1915 Ca1. 103 and agreed with the view that subsequent events can be taken into account with a view to doing complete justice to the parties. In the case of Mahalinga Thambiran v. Arulnandi Thambiran (1974) 1 S.C.C. 150, it has been observed thus in paragraph 45 of the judgment:

.... Normally, a Court will declare only the rights of the parties as they existed on

the date of the institution of the suit. But, in this case on account of the subsequent event, namely, the death of the Defendant, we have to mould the relief to suit the altered circumstance. If the Defendant had been alive, it would have been sufficient if we had declared, as the learned, Single Judge has done, that the Appellant was the Elavarsu of the Kasi Mutt. Now that the Defendant is dead, we make a declaration to at the Appellant was holding the position of the Elavarsu during the life time of the Defendant, that the revocation of the nomination of the Appellant as the Elavarasu by Exhibit B-9 was bad, and that the Appellant was entitled to succeed to the headship of the Mutt on the death of the Defendant.

A review of the legal position thus leaves the matter beyond doubt that it is the duty of the appellate Court to take all subsequent developments in the litigation both of fact and law into consideration and modulate the relief in an appropriate way with a view to doing complete justice to the parties. Admittedly Defendant No. 1 died during the pendency of the litigation. As found by the lower appellate Court, the status of Defendant No. 1 was only that of a bhag chasi with life interest, and the right was not heritable. In that, view of the matter, it would not be appropriate to dismiss the suit by merely holding that the suit when instituted was not maintainable. On the other hand, litigation would be cut short, complete justice would be done to parties and nobody would at all be prejudiced if in this very suit, on the admitted basis of the death of Defendant No. 1 pendente lite, the relief prayed for is modulated and the legal representatives of Defendant No. 1 are evicted from the property on the footing that they are trespassers.

10. I would accordingly allow the appeal, vacate the judgment and decree of the learned Subordinate Judge and restore those of the trial Court with costs throughout.