
(1992) 03 OHC CK 0020
In the Orissa High Court
Case No : Civil Revision No. 970 of 1990

Narendra Ray

APPELLANT

Vs

Kunjabehari Ray and Another

RESPONDENT

Date of Decision : 03-03-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, 11
Orissa Land Reforms Act, 1960 — Section 9

Citation : AIR 1992 Ori 217

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : B.H. Mohanty, for the Appellant; P.K. Patnaik, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—The plaintiff has filed this revision petition assailing the order dated 13-11-90 of the trial Court dismissing the suit as barred by principle of res judicata.

2. The petitioner filed Title Suit No. 9 of 1989 in the Court of the Second Munsif, Cuttack against the opposite parties seeking the reliefs, inter alia, to declare his exclusive right, title and interest to the suit property as occupancy tenant, to confirm his possession over the same, to permanently restrain the defendants not to interfere with his possession over the suit property except exercising their right of way over the eastern portion of the suit plot and to declare that the decree passed in Title Suit No. 83 of 1972 by the Munsif, Second Court, Cuttack and confirmed in Title Appeal No. 27 of 1975 and Second Appeal No. 68 of 1979 is nullity and non est. The suit property as described in Schedule "A" to the plaint is A.O.01 decimal of land under Sabik Malik Khata No. 47, Sikim Khata No. 10, Sikim Sabik plot No. 173 corresponding to Hal Stritiban Khata No. 22, Sikim Khata No. 8, Sikim plot No. 188 in village Bagalsahi over which farm house/ cowshed of the plaintiff is situated. The gist of the plaintiffs case, as stated in the plaint is as follows;

Sabik Khata No. 47 stood recorded in the name of Brundaban Ray, father of the defendants, as the occupancy tenant in respect of the said khata. Under the said khata there was a sikim khata No. 10 which contained plot No. 173 with an area of A.O.01 decimal; the said plot stood recorded in the name of Ankur Ray, father of the plaintiff. Ankur was possessing the C.S. plot No. 173 as a sikim tenant under the owner of the parent khata No. 47. He built a farm house in which he was keeping his cattle and storing agricultural implements and produce from his other lands in village Bagalsahi. As per the Sabik C.S. record the owner of C.S. khata No. 47 had a right of passage over the eastern portion of C.S. plot No. 173. Subject to this right of way, plaintiffs father was the exclusive owner in possession of C.S. sikim plot No. 173 and the farm house standing on it. After his death the plaintiff succeeded to the property and continued to possess the same in the same manner as his father was doing. Neither the defendants' father nor the defendants had raised any objection regarding right, title, interest or possession of the plaintiff and his father to the suit property nor to the recording of the name of Ankur in the C.S. record of rights. In view of the plaintiffs exclusive ownership and possession of the property the said plot was recorded under plot No. 188 with an area of A.O. 01 decimal in sikim Khata No. 8 in the Major Settlement records in the name of the plaintiff to the knowledge of the defendants who by then had succeeded to their father Brundaban Ray in respect of Sabik C.S. Khata No. 47 corresponding to Hal Khata No. 22. Therefore even in the Hal settlement record the plaintiff is recorded as sikim tenant under the defendants with the note that the defendants have a right of way over sikim plot No. 173. To this recording also the defendants never raised any objection.

In 1972 a dispute having arisen between the parties regarding the right of way over the plot, the defendants filed Title Suit No. 83 of 1972 in respect of sikim plot No. 188 for a declaration of their exclusive right, title and interest over it and for a further declaration that the present plaintiff has no right, title and interest in the plot and for other consequential reliefs. The suit was decreed in favour of the present defendants, on 3-1-75 when Section 9 (1) of the Orissa Land Reforms Act (O.L.R. Act) was in force. During pendency of the suit the plaintiff had filed an application under the O.L.R. Act for being recognised as an occupancy tenant in respect of Hal Plot No. 188 corresponding to Sabik plot No. 173 before the Tahsildar, Niali wherein the defendants in their written statement admitted that they had permitted the plaintiff's father to construct a house on the plaintiff's plot and he has constructed the same. The defendants having succeeded in the suit, the plaintiff filed Title Appeal No. 27 of 1975. At the time of hearing of the appeal the plaintiff drew attention of the appellate Court that he had filed an application before the concerned Revenue Officer u/s 9(1) of the O.L.R. Act for being recognised as sthitiban tenant in respect of the property and contended that the civil Court has no jurisdiction to decide the matter. Considering the said contention the appellate Court framed an additional issue -- whether the jurisdiction of the civil Court to try the suit was ousted u/s 67 of the O.L.R. Act and remanded the case to the trial Court for giving its finding on the

said issue after giving opportunity to the parties to give evidence and to return the said finding to the appellate Court. The trial Court on consideration of the matter, which according to the plaintiff was erroneous misconceived recorded the finding that the plaintiff was not ordinarily residing on Sabik C.S. plot No. 173 and therefore his application u/s 9(1) of the Q.L.R. Act was not maintainable; consequentially the Court held that the jurisdiction of the civil Court was not barred u/s 67 of the O.L.R. Act. The appellate Court accepted the finding and dismissed the appeal. Against the appellate decree the plaintiff filed Second Appeal No. 68/79 before this Court wherein, as stated in the plaint, this Court dismissed the appeal on 22-2-85 without deciding the question of jurisdiction. Thereafter on 15-1-87 the Revenue Officer disposed of the petition filed by the plaintiff u/s 9(1) of the O.L.R. Act declaring him as a sthitiban raiyat over the suit land with the right of permanency, heritability and transferability and further declaring that the right of the opp. parties (defendants) shall stand extinguished over the suit land except the right of passage as recorded during the settlement operation. It is the case of the plaintiff that in view of the said order of the Revenue Officer which is binding on the defendants the effect of the decree in Title Suit No. 83 of 1972 which was confirmed in Title Appeal No. 27 of 1975 and Second Appeal No. 68 of 1979 has been rendered null and void and the said decree cannot be executed against him in Execution Case No. 14 of 1988 filed by the defendants. On these averments the plaintiff sought the reliefs noted earlier.

3. The defendants while denying the claim of the plaintiff to the suit property and refuting the assertions in the plaint stated in paragraph 4 of the written statement that the suit was hit by the principle of res judicata inasmuch as the properties and the issues involved in the suit were directly and substantially in issue in Title Suit No. 83 of 1972 between the same parties and had finally been decided in Title Appeal No. 27 of 1975 and Second Appeal No. 68 of 1979 and as such the suit is not sustainable. They also took the plea that the suit was not maintainable in view of the provisions of Sections 4 and 51 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (for short, "the Consolidation Act") inasmuch as in the records prepared by the consolidation authorities the defendants have been recorded as owners of the suit property. They pleaded for dismissal of the suit.

4. The trial Court formulated ten issues of which issue No. 4 reads: "Is the suit hit under the principle of res judicata" and issue No. 8 reads : "Is the decree passed in T.S. No. 83/72 by the Munsif, Second Court, Cuttack and confirmed in T.A. No. 27/75 and S. A. No. 68/79 is nullity and non-executable?"

5. During pendency of the suit the defendants filed an application under Order 14, Rule 2, CPC (C.P.C.) with the prayer to decide the suit on the preliminary question of law, whether the suit is hit by principle of res judicata and under Sections 4 and 51 of the Consolidation Act.

6. In his objection to the said petition the plaintiff objected to the disposal of the suit on preliminary issue and further stated that the principle of res judicata has

no application to the present suit since the previous suit was decided while the application u/s 9 of the O.L.R. Act was pending before the Revenue Officer and in view of the decision of the said authority declaring the plaintiff as a sthitiban tenant in respect of the suit property the decree in the previous suit has been rendered a nullity. Regarding the proceedings under the Consolidation Act the plaintiff stated that the matter is pending before the Commissioner, Consolidation in Revision Case No. 862 of 1988 and therefore it has not yet attained finality.

7. It appears from the order-sheet of the suit that the trial Court by order dated 30-10-90 considered the petition under Order 14, Rule 2, C.P.C. and the objection to it and posted the case to 5-11-90 for order. Since the order was not ready on 5-11-90 the case was adjourned to 13-11-90 on which date he passed the impugned order considering the preliminary questions on merits and holding that the decision in Title Suit No. 83 of 1972 acts as res judicata in the present suit. The court however negated the plea of the defendants that the suit is not maintainable under Sections 4 and 51 of the Consolidation Act. Accordingly it dismissed the suit as barred by the principle of resjudicata. Hence the revision petition.

8. Before considering the judgment of the Court below on its merit, I would like to deal with the procedure followed by the Court. As the order-sheet of the suit reveals, the learned Munsif did not pass a separate order accepting the defendants' prayer to consider the issue relating to maintainability of the suit and allowing the application filed by them under Order 14, Rule 2, C.P.C. It appears that he straightway considered the issue on its merit and by the impugned order upheld the objection raised by the defendants that the suit is barred by the principles of res judicata. The record also reveals that no evidence, oral or documentary, was produced in support of the preliminary issue decided by the Court below. The procedure, in my view was not only irregular but it also affected the decision on the question.

While considering an application under Order 14, Rule 2, C.P.C. the first question for determination by the trial Court is whether an acceptable case has been made out for taking up the issue in question as a preliminary issue. In this connection the Court has to bear in mind that the general rule is to take up all the issues together and piecemeal trial of the issues is to be avoided. It is only in certain exceptional circumstances as provided under Order 14, Rule 2, C.P.C. that the Court should accede to the prayer for taking up one or more of the issues as preliminary issues. If the trial Court decides to allow the prayer of the applicant to take up the issue in question as preliminary issue, then the parties should be called upon to produce evidence in support of their respective cases relating to that issue and on consideration of the materials, if any, produced by the parties, the Court should decide the issue and the suit. In the present case, as noted earlier, the learned trial Judge did not follow this procedure and passed the impugned order by which he not only allowed the defendants' application under Order 14, Rule 2, C.P.C. but also decided the issue relating to res judicata on its

merit. In all probability the parties were not aware that the issue is going to be decided on its merit and therefore had not produced materials in support of the respective cases pleaded by them.

9. As noticed earlier, the issue decided by the learned trial Judge is -- if the suit is hit by the principle of *res judicata* inasmuch as the properties and issues involved in the suit were directly and substantially in issue in Title Suit No. 83 of 1972. For proper appreciation of the point and proper adjudication of the matter the trial Court was required to consider the scope of the previous suit and the present suit, the issues framed and decided in the previous suit and those framed in the present suit and the effect of the decisions in the previous suit on the present suit. Since the decision of the trial Court in the previous suit was also the subject matter of appeal and second appeal, the judgments of the appellate courts were also to be considered by the Court. As the record of the trial Court reveals, neither have any of the parties produced these material documents nor has the learned trial Judge passed any order for production of these documents. Non-consideration of such material and relevant documents, in my view, has vitiated his decision on the point. It appears that the learned trial Judge proceeded on the basis of a general impression that the material issues involved in the two suits are the same. If he had carefully perused the plaint in the present case he would have found that the basis of the suit is different from that of the previous suit. In the present suit the plaintiff seeks a declaration that the decree passed in the previous suit had become invalid and inexecutable since after disposal of the suit and the appeals arising therefrom the competent revenue authority has declared him to be a occupancy tenant in respect of the suit land. Indeed, the reason for filing the present suit, as stated in the plaint, is the decision of the revenue authority which was given after disposal of the previous suit. But the question that was considered and decided by the Court in the previous suit was whether pendency of the plaintiff's application u/s 9 of the O.L.R. Act affected the maintainability of that suit. That question was answered in the negative. On perusal of the plaint it is also clear that the material question that falls for determination in the present suit is as formulated under issue No. 8, that is, if the decree passed in T.S. No. 83/72 by the Munsif, Second Court, Cuttack and confirmed in T. A. No. 27 of 1975 and S.A. No. 68/79 is nullity and non-executable. The said issue has neither been nor could have been considered in the previous suit. The said issue has also not been considered by the learned Munsif in the impugned order.

From the discussions in the foregoing paragraphs and the reasons stated therein, it is my considered view that the learned Munsif clearly erred in disposing of the suit on the preliminary issue, both regarding the procedure followed by him and the merit on the point. The impugned order is, therefore, unsupportable.

10. Accordingly the revision petition is allowed, the order dated 13-11-90 is set aside and the learned Munsif is directed to take up all the issues arising in the case and dispose of the suit in accordance with law. Parties will bear their

respective costs of this proceeding.