

(1984) 11 OHC CK 0012

In the Orissa High Court

Case No : Civil Revision No. 204 of 1981

Patel Majhi and Others

APPELLANT

Vs

Mst. Raimati Kisani and Others

RESPONDENT

Date of Decision : 23-11-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Orissa Land Reforms Act, 1960 — Section 40, 40(1)

Citation : AIR 1985 Ori 168 : (1985) 59 CLT 19

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

Bench : Single Bench

Advocate : R.K. Mohapatra and B.C. Routray, for the Appellant; N.C. Pati, on behalf of P.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—The defendants in Title Suit No. 35/46 of 1966 in the Court of the Subordinate Judge, Sambalpur have filed this petition u/s 115 of the C. P. Code challenging the order, allowing the application filed by the opposite parties for amendment of the plaint.

2. The plaintiffs-opposite parties filed the suit for partition of the lands described in Schedule "A" and "B" of the plaint. The defendants in their written statement took the plea that lands under Schedule "B" are their self-acquired properties and as such not available for partition.

The trial Court accepting this contention of the defendants decreed the plaintiff's suit in respect of "A" schedule lands and dismissed the suit in respect of the "B" schedule lands. Against this decision the defendants preferred an Appeal (Title Appeal No. 16/79). The Appellate Court set aside the decision of the trial Court and remanded the suit to the trial Court for fresh disposal after recording the evidence on two points viz :--

(i) When Smt. Fulmati died and whether the substitution of her legal

representative was necessary?

(ii) Whether the subject matter of the suit fell within the relevant provisions in Chapter IV of the Orissa Land Reforms Act relating to the determination of the ceiling in order to determine whether the Court had jurisdiction to entertain a suit and pass a decree for partition?

After the matter was received in the trial Court on remand, the plaintiffs filed a petition for amendment of the plaint, to delete the lands described in the schedule "B" for the purpose of avoiding the bar u/s 40(1) of the Orissa Land Reforms Act.

3. The petitioners filed their objection to the application for amendment on the grounds, inter alia, that the amendment if allowed would nullify the appellate order in part and it would prejudice them. The trial Court negatived, the objection and allowed the application of the plaintiff-opposite parties under Order 6, Rule 17 of the C.P. Code.

4. The learned counsel for the petitioner, has reiterated the objections taken by his clients in the Court below as indicated above. The contention is devoid of force and, in my view, the order passed by the Court below is unassailable.

5. As already noticed above, the lands in schedule "B" of the plaint were claimed by the petitioners to be their self acquired property and hence not available, for partition. This position was accepted by the counsel appearing for the opposite parties in course of argument as observed by the Court below in the impugned order. In view of the said concession the trial Court dismissed the suit for partition in respect of "B" schedule lands. The plaintiffs neither filed any appeal nor cross-objection against that part of the decree. The appeal was filed by the defendants against the decision of the trial Court decreeing the suit in respect of "A" schedule lands. As such, the decision of the trial Court dismissing the suit in respect of the "B" schedule became final. In these circumstances, allowing the plaintiffs prayer for deleting Schedule "B" lands from the plaint does not alter the position in any manner and the petitioner are in no way prejudiced by the said amendment.

6. Another contention raised on behalf of the petitioners, is that, the amendment was sought for only with a view to avoid the bar u/s 40(1) of the Orissa Land Reforms Act. This contention too is without merit. Section 40(1) of the Act reads as follows : --

"(1) Except where he is permitted in writing by the Revenue officer so to do, no person holding land in excess of the ceiling area shall, after the commencement of the Orissa Land Reforms (Amendment) Act, 1973, transfer by sale, gift or otherwise or effect any partition of such land or any part thereof until the surplus land, which is to vest in the Government u/s 45, has been determined and taken possession of by or on behalf of the Government and all transfers made and partitions effected in contravention of the Sub-section shall be void."

Provided that nothing contained in this Sub-section shall apply to -

(a) any transfer by way of mortgage executed in favour of -

(i) the Central Government or any State Government.

(ii) any public financial institution;

(iii) any bank to which the Orissa Cooperative Societies Act, 1962 applies;

(iv) any corporation established by law which is owned, controlled or managed by the Central Government or by any State Government;

(v) any company in which not less than fifty one percent of the paid up share capital is held by the Central Government or by any one or more State Governments; or

(b) any sale of land in execution of decree or order of an award for the realisation of money due under any such mortgage."

From the aforesaid, it is clear that in order to determine whether the provisions of Section 40(1) of the Act is attracted in the case, it has to be found that whether the plaintiffs held lands in excess of the ceiling area. For this purpose lands in respect of which the finding has been recorded that the plaintiffs have no interest therein, cannot be taken into account for determining whether they hold lands in excess of the ceiling area or not. Therefore, filing of the petition for deleting the lands described in Schedule "B" does not affect the merit of the case in respect of the points on which the appellate Court has directed the trial Court to consider in the remand order. Further, the Court below has observed that "A" Schedule lands are to the extent of 28 acres and odd and hence, the objection on the basis of Section 40(1) of the Orissa Land Reforms Act is available to be raised in respect of the same.

7. In these circumstances, the Court below has rightly held that the proposed amendment neither changes the nature and character of the suit nor does it prejudice the defendants-petitioners in any manner. In the result, the revision petition is devoid of merits and the same is accordingly dismissed, but in the circumstances of the case, without costs of this proceeding.