
(1976) 06 OHC CK 0009
In the Orissa High Court
Case No : A.H.O. No. 40 of 1975

Petambar Pujari

APPELLANT

Vs

Bhikari Meher and Another

RESPONDENT

Date of Decision : 23-06-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92(3), 11
Orissa Land Reforms Act, 1960 — Section 22(3)

Citation : AIR 1977 Ori 16 : (1976) 42 CLT 927

Hon'ble Judges : R.N. Misra, J; N.K. Das, J

Bench : Division Bench

Advocate : R.K. Rath, for the Appellant; R.C. Patnaik and P.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Plaintiff sued for declaration of title for the disputed property and having lost in the original Court as also in the Court of appeal had carried Second Appeal No. 4 of 1972 to this Court. Our learned brother Acharya, J., also found against the plaintiff but having granted leave to appeal to a Division Bench, this appeal has been filed.

2. The second defendant obtained a money decree against the plaintiff and levied execution of the decree in execution case No. 239 of 1957. The disputed property of the plaintiff was attached and ultimately sold by the Court on 15-4-1968. Defendant No. 1 purchased the same in Court auction and the sale in his favour was confirmed on 20th of June, 1968, there having been no objection raised to the sale. Admittedly the plaintiff is a member of the Scheduled Tribes while defendant No. 1 is not. Plaintiff filed the suit on the basis that the sale was in violation of the mandatory provisions of Section 22 (3) of the Orissa Land Reforms Act of 1960 and was, therefore, void, invalid and inoperative and did not confer on defendant No. 1 any title.

3. Both the defendants filed a joint written statement and claimed that the

provisions of Section 22 (3) of the Orissa Land "Reforms Act must be deemed to have been complied with when the Court sold the property in favour of defendant No. 1; the sale in favour of defendant No. 1 is not void and invalid in law and, therefore, plaintiff as judgment-debtor having not taken appropriate steps in the execution proceeding is not entitled to file this suit for the relief claimed.

4. The Courts below have consistently found that while plaintiff is a member of the Scheduled Tribes, defendant No. 1 is not. The only question which requires examination is as to whether the auction sale is invalid in law. Section 22 of the Orissa Land Reforms Act (hereinafter referred to as the "Act"). At the relevant time ran thus :--

"(1) Any transfer of a holding or (a part?) thereof by a raiyat, belonging to a Scheduled Tribe shall be void except where it is in favour of-

(a) a person belonging to a Scheduled Tribe, or

(b) a person not belonging to a Scheduled Tribe when such transfer is made with the previous permission in writing of the Revenue Officer :

Provided that in case of a transfer by sale the Revenue Officer shall not grant such permission unless he is satisfied that a purchaser belonging to a Scheduled Tribe willing to pay the market price for the land is not available, and in case of a gift unless he is satisfied about the bona fides thereof.

(2) The State Government may having regard to the law and custom applicable to any area prior to the date of commencement of this Act by notification direct that the restrictions provided in Sub-section (1) shall not apply to lands situated in such area or belonging to any particular tribe throughout the State or in any part of it.

(3) No such holding shall, unless the Court otherwise directs, be sold in execution of a decree to any person not belonging to a Scheduled Tribe.

(4)"

Section 23 declares that where a transfer is in contravention of Sub-section (1) of Section 22, the Revenue Officer has jurisdiction to declare the same to be invalid.

5. It is not the plaintiff's case that he was not aware of the execution proceeding and the developments therein from stage to stage. He did not take any step in accordance with the provisions of Order 21 of the CPC for setting aside the sale nor did he raise any objection to the saleability of the property before the property was actually brought to sale. The fact that the judgment-debtor belonged to the Scheduled Tribes and was, therefore, entitled to the protection u/s 22 of the Act was within the judgment-debtor's special knowledge and it was his duty to invite the attention of the Court to such a position. Nothing, however, was done. The Courts below have, therefore, proceeded on the footing that the filing of a separate suit is barred in view of the provisions in Order 21, Rule 92

(3) of the Code of Civil Procedure.

6. Mr. Rath for the appellant claims that the provision contained in Section 22 of the Act is a beneficial one made in accord with the public policy and a breach thereof, therefore, should be strictly viewed. Undoubtedly the provision is a beneficial one and in accord with the accepted public policy of protecting the weaker sections of the community, as has been held by a Bench of this Court in the case of *Ram Chandra Swain v. S. D. O., Sadar, Cuttack* 38 (1972) CLT 980. We, however, find it difficult to accept Mr. Rath's contention that there was an obligation on the part of the executing Court to inquire as to whether the judgment debtor before it belonged to the Scheduled Tribes before the property was put to sale. There is no obligation cast on the executing Court to make an inquiry as to whether a judgment-debtor, before it belongs to any of the Scheduled Tribes or Scheduled Castes for purposes of determining whether such judgment-debtor is entitled to protection of the Act. In the absence of any provision fault cannot be found with the executing Court for not having made any such inquiry. We agree with Mr. Rath that the protection conferred by law has not worked out and if the matter had been brought to the notice of the Court at the appropriate stage, the sale may not have taken place. After the sale has taken place, however, the same approach is not possible. Rights of parties have already worked out and the judgment-debtor on account of his conduct of silence when he was required to speak or take action, cannot be overlooked.

7. In a Full Bench decision of the Patna High Court *Baijnath Prasad Sah Vs. Ramphal Sahni and Another*, , similar question was examined at great length. Sale in that case had taken place contrary to Section 49-M (1) (b) of the Bihar Tenancy Act which provided :--

"No decree or order shall be passed by any Court for the sale of the right of a raiyat, who is a member of the scheduled tribes, scheduled castes, or backward classes in his holding or in any portion thereof, nor shall such right be sold in execution of any decree except as provided in Sub-section (2)."

The Court held that the doctrine of *res judicata* was very much wider in scope than Section 11 of the CPC and applied to execution proceedings. If a party took an objection at a certain stage of a proceeding and did not take another objection which it might and ought to have taken at the proper stage, it must be deemed that the Court had adjudicated upon the other objection also and had held against it. The principle of constructive *res judicata* has been extended further. If a party has knowledge of a proceeding and having had an opportunity when it might and ought to have raised an objection, it does not do so, it cannot be allowed to raise that objection subsequently, if the Court passes an order which it could not have passed in case that objection had succeeded, on the ground that it must be deemed to have been raised by the party and decided against it. Though a transaction is void if a certain provision of law applies, it is for the Court to decide whether that provision is applicable. Once a competent Court has given a decision holding expressly or by implication that that provision

of law is inapplicable and the transaction is not void, that decision operates as res judicata between the parties. So also if an order of the Court is deemed to have decided the question, the order is binding upon the parties. In paragraph 52 of the reported decision, the following conclusion was reached :--

"... .. It is immaterial whether the sale of the lands in question is void or voidable because we have to consider, at present, the consequence of the judgment-debtor not having raised the objection before the sale when he might and ought to have raised it. In accordance with the views which I have expressed, I hold that the judgment-debtor is barred by the principle of constructive res judicata from raising the objection on the ground of non-saleability of the kasht lands."

To the same effect is a direct decision of this Court in the case of Damodar Mahapatra v. Raghunath Pradhani ILR (1969) Cut 202, which had followed the principles indicated in the aforesaid Full Bench decision.

8. Mr. Rath for the appellant placed reliance on a decision of the Supreme Court in the case of Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, and contended that res judicata which is a rule of procedure cannot supersede the law of the land. The question for consideration before the Supreme Court was one of jurisdiction of the Court and the Supreme Court was of the view that if by an erroneous interpretation of a statute, the Court held that it had no jurisdiction, that determination would not operate as res judicata. Similarly by an erroneous decision if a Court assumes jurisdiction which it did not possess by statute, the question cannot operate as res judicata between the parties, whether the cause of action in the subsequent litigation is the same or otherwise, because, if those decisions are considered as conclusive it would assume the status of a special rule of law applicable to the parties relating to the jurisdiction of the Court in derogation of the rule declared by the Legislature. Such a question does not arise here. As already noticed, the Court had jurisdiction to sell the property and even accord permission for its sale as provided u/s 22 (3) of the Act In view of this position, we do not think that in the facts of the case, the rule indicated in the Supreme Court decision should apply.

9. We reach the same conclusion as our learned brother Adharya, J., had and accordingly this appeal must stand dismissed. As we find, there was no decree for costs in any of the appellate Courts. In our view, it is appropriate that the parties are called upon to bear their own costs throughout.

Das, J.

I agree.