

(2007) 08 OHC CK 0007
In the Orissa High Court
Case No : First Appeal No. 191 of 1985

Raghunath Khadenga (since dead) represented by his legal heirs APPELLANT

Vs

Sri. Krushna Chandra Dash (since dead) represented by his legal heirs and Others RESPONDENT

Date of Decision : 30-08-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47, 9
Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (2008) CLT 263 Supp : (2008) OLR 263 Supp : (2007) 2 OLR 708 Supp

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Advocate : B.H. Mohanty and Associates, for the Appellant; A.P. Bose and R.K. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Parichha, J.—This is an appeal by the unsuccessful Plaintiff against the judgment and decree passed by the learned Subordinate Judge, Athagarh in T.S. No. 4 of 1979.

2. The Appellant as the Plaintiff filed the aforesaid suit for declaration of his title over the suit land, recovery of possession of the same and for mesne profit. The Plaintiff's case, in essence, was that he is a member of the Banki Traders Co-operative Society Ltd. (hereinafter to be referred to as "the Society", in short) and he incurred loan of Rs. 1500/- from the Society on 6.2.1949 by mortgaging the suit land as security. Since the loan amount was not repaid, the Assistant Registrar, Co-operative Societies, Cuttack passed award for realization of the loan dues with interest and that award was put to execution in the Court of Munsif, Athagarh in Execution Case No. 7 of 1953. In that proceeding the suit land of the Plaintiff was put to auction sale and was purchased by one Gobinda Panda. The Plaintiff as judgment Debtor filed a petition u/s 47 of the CPC vide Misc. Case No.

27 of 1953 challenging the maintainability of the execution proceeding. The executing Court after hearing the parties held that the award under execution was passed without jurisdiction and that the sale of the suit land in the execution proceeding was a nullity. After this order of the executing Court, the Banki Traders Co-operative Society Ltd. (proforma Defendant No. 17) sought assistance of the Assistant Registrar, Co-operative Societies u/s 48 of the Bihar and Orissa Co-operative Societies Act, 1935 (which was subsequently re-enacted as Orissa Co-operative Society Act) for resolving the dispute. The Assistant Registrar, Co-operative Societies, (in short, "ARCS") registered that dispute as Dispute Case No. 57M of 1955-56 and referred the dispute to Arbitrator, Banchhanidhi Kar, who was one of the Directors of the Banki traders Co-operative Society; despite the protest of the Plaintiff. According to the Plaintiff, the Arbitrator, who had no jurisdiction passed the award against him and one Achuta Sukla, without giving any opportunity of hearing to them. Thereafter, Defendant No. 17 instead of remitting the said award to the Assistant Registrar, Co-operative Societies, Cuttack filed execution case No. 45 of 1957-58 and in that proceeding suppressing all the processes put the suit land to auction sale on 24.7.1960 and in absence of any bidder, Defendant No. 17 itself purchased that suit land for Rs. 3280/-. Later on Defendant No. 17 executed a sale deed in favour of Defendant No. 1 for the suit land. According to the Plaintiff, once the award was declared a nullity by the executing Court, the subsequent proceeding and the award passed therein was illegal and invalid. He further pleaded that although the dispute case and the auction sale etc. took place, yet he was all along in possession of the suit land and neither delivery of possession of the suit land was given to Defendant No. 17 nor Defendant No. 17 acquired any title over the suit land and accordingly, the sale deed in favour of Defendant No. 1 also did not convey any title to Defendant No. 1. Plaintiff alleged that he was in continuous possession of the suit land, but Defendant No. 1 and his men forcibly entered into a portion of the suit land in 1969 and in other part of the suit land in 1971 to disturb his possession thereon for which he and his vendees filed several criminal cases and 145 Code of Criminal Procedure proceedings. Since those proceedings did not yield any positive result, he filed the suit seeking the above mentioned reliefs.

3. None of the Defendants, except Defendant Nos. 1, 7(a) and 7(b) filed any written statement. Defendant No. 7(a) and (b) no doubt filed written statement, but they also did not appear thereafter to contest the suit. Defendant No. 1 was the main contesting party. While refuting the claim and allegation of the Plaintiff, Defendant No. 1 pleaded, inter alia, that the award passed against the Plaintiff for realization of the outstanding dues was a valid one, that the sale of the suit land by way of auction sale in favour of Defendant No. 17 was valid and Defendant No. 17 also got delivery of possession of the suit land and became owner in possession thereof and therefore, the sale effected by Respondent No. 17 in his (Defendant No. 1) favour was also a valid one. Defendant No. 1 claimed that after purchase of the suit land on 6.7.1966, he is in possession of the same and has also sold some parts of the suit land to some of the Defendants, who are

in possession of those portions of the suit land and for the said reason, the criminal cases instituted by the Plaintiff ended in favour of Defendant No. 1 and the purchasers. Defendant No. 1 specifically pleaded in the written statement that the suit is barred by limitation, estoppel, waiver, acquiescence and principle of res judicata. He also challenged the jurisdiction of the Civil Court to entertain the suit.

4. From the pleadings of the parties, learned trial Court framed the following 12 issues.

- (i) Is the suit as laid maintainable?
- (ii) Is the suit barred by the laws of limitation?
- (iii) Has the Plaintiff any locus standi to bring this suit?
- (iv) is the suit barred by law of estoppel, waiver and acquiescence?
- (v) Is the suit barred by the principle of res judicata?
- (vi) Has the Plaintiff any cause of action to bring the suit?
- (vii) To what relief, if any, the Plaintiff is entitled?
- (viii) Can the Plaintiff get any relief without setting aside the award of the Arbitrator, Sri. B. Kar?
- (ix) Has the Defendant No. 17 get title to the suit property by purchasing the same in Execution proceeding of the Banki Traders" Co-operative Society?
- (x) Whether the Defendant No. 1 has acquired right, title and possession begin the purchaser of the suit property from Defendant No. 17?
- (xi) Has the Plaintiff any right, title and interest to the suit property?
- (xii) Since when Defendant No. 1 is in possession of the suit lands?

Plaintiffs besides himself examined three witnesses and produced documents, which were marked as Exts. 1 to 8. Defendant No. 1 also examined four witnesses including himself and the documents filed by him were marked as Exts. A to R respectively. Considering these evidence and submission of the parties, learned trial Court held that Defendant No. 17 got title over the suit property through purchase in the execution proceeding, that the sale of the suit land by Defendant No. 17 in favour of Defendant No. 1 was valid and Defendant No. 1 acquired right, and title, that the Plaintiff has lost his right and title over the suit property, that, in view of Section 112 of the Orissa Co-operative Society Act, 1951 (in short, "Act, 1951) the Civil Court has no jurisdiction to entertain the suit, that the suit is bared by limitation and principle of res judicata, estoppel, waiver, acquiescence and that the Plaintiff has no cause of action to bring the suit. Accordingly, learned trial Court dismissed the suit on contest against Defendant No. 1 with cost and ex parte against other Defendants without

cost. The said judgment and decree of learned trial Court is under challenge in this appeal.

5. Mr. B.H. Mohanty, learned Counsel for the Appellant submitted that after the order of the executing Court in Misc. Case No. 27 of 1953 that the award is invalid being passed without jurisdiction, there was no scope for the subsequent dispute proceeding and passing of another award. He contented that the subsequent award is also illegal and non est for the simple reason that the award was never sent back to the Assistant Registrar for necessary action but was directly put to execution by Defendant No. 17 in Execution Proceeding No. 45 of 1957-58. His further contention was that even if there was auction sale of the suit land in favour of Defendant No. 17, no sale certificate confirming sale and document relating to delivery of possession were produced by Defendant No. 17, whereas the evidence, both oral and documentary, adduced by the Plaintiff show that he was in possession of the suit land till 1969, which suggest that Defendant No. 17 never acquired any title over the suit land. According to Mr. Mohanty, when Defendant No. 17 had no title or possession over the suit land, the sale deed in favour of Defendant No. 17 could not convey any right, title of the suit land in favour of Defendant No. 17. His further contention was that when the Plaintiff was admittedly the original owner in possession of the suit land, he was not required to prove that he was in possession of the suit land within 12 years from the date of institution of the suit, on the contrary, Defendant Nos. 17 and 1 were duty bound to prove dispossession of the Plaintiff and loss of Plaintiff's title over the suit land. Mr. Mohanty further contended that the dispute case No. 57M of 1955-56 relates to the dispute between the purchaser Gobinda Panda and the Society, and so any order passed in that case would not estop the Plaintiff from bring the suit particularly when the suit of the Plaintiff was for declaration of his title, recovery of possession and involves persons, who are not the members of the Society and therefore, the Civil Court had jurisdiction to entertain the suit, and the Appellant's suit was never hit under the principle of res judicata, estoppel and acquiescence. Mr. Mohanty alleged that the learned trial Court lost sight of the above noted factors and in consequence arrived at wrong conclusions. He also stated that the issue of delivery of possession of the suit land to Defendant No. 17 can be clarified by calling for the records and registers of the co-operative societies by way of additional evidence.

6. Mr. A.P. Bose, learned Counsel for Respondent No. 1 supported the impugned judgment and decree and argued that the Plaintiff himself admitted his dispossession in 1969 and the possession of Defendant No. 17 and his men over the suit land thereafter and when in addition to such admission there was clear documentary evidence such as rent receipt, order of the criminal Courts, intimation Ext. M about the delivery of possession and oral evidence showing possession of Defendant No. 17 from 1960, learned trial Court was justified in its ruling that Defendant No. 17 and Defendant No. 1 have acquired title over the suit land. Mr. Bose submitted that the Plaintiff participated in the dispute case and received notice in the execution proceeding, and he also did not challenge

the award in appeal u/s 128 of the Act, 1951. So his suit was barred under the theory of waiver and acquiescence. He states that the dispute case bearing No. 2 of 1965 and the appeal thereof bearing No. 5 of 1969 were dismissed and so the suit was also barred by the principle of res judicata, estoppel and furthermore his suit before the Civil Court was also not maintainable in view of Section 112 of the Orissa Co-operative Societies Act, 1951. Refuting the submission of the learned Counsel for the Appellant, Mr. Bose contended that the ARCS, Cuttack can act as Registrar as per Section 8(1) of the Act, 1951 and a member of the Society can be appointed as Arbitrator as per Rule 90(5) of the Co-operative Societies Rules. He also indicated that the auction sale made in favour of Defendant No. 17 was not only confirmed by issue of sale certificate, but the oral and documentary evidence were also there to show delivery of possession and therefore, Defendant No. 17 had good title over the suit land.

7. From the submission of the learned Counsel for the parties, it appears that the controversy relates to the following aspects:

- (i) Whether the dispute case No. 57(m) of 1955-56 and the execution proceeding that followed and the auction sale made in favour of Defendant No. 17 are without jurisdiction?
- (ii) Whether the Defendant No. 17 acquired title over the suit property?
- (iii) Whether the sale transaction effected by Defendant No. 17 in favour of Defendant No. 1 convey and title in favour of Defendant No. 1?
- (iv) Whether the Plaintiff was forcibly dispossessed in 1969 and 1971 or whether he was dispossessed by delivery of possession of the suit land in the execution proceeding?
- (v) Whether the suit of the Plaintiff was maintainable in the Civil Court?
- (vi) Whether it was barred by limitation and hit by the principle of res judicata and estoppel?

8. Before delving into the aforesaid aspects, it is necessary to pass orders on the petitions for amendment and additional evidence. In the petition for amendment, an additional prayer is sought to be introduced, wherein the Plaintiff has prayed for avoiding the award passed in Dispute Case No. 57/M of 1955-56. Since this aspect is borne in the pleading of the Plaintiff and has been considered by the learned trial Court in the judgment, the proposed amendment now seems unnecessary. Accordingly, the prayer is rejected. The other application contains a prayer to direct the Defendant No. 17 to produce the records of the dispute case No. 57/M of 1955-56 on the plea that the same is necessary to ascertain whether the Plaintiff was noticed in the dispute case and in the execution proceeding and whether delivery of possession to Defendant No. 17 was effected. The Plaintiff himself admitted in cross-examination that the Arbitrator issued notice and he filed show cause and in the said show cause, he did not raise any objection regarding appointment of Sri B. Kar as Arbitrator. After this statement of the

Plaintiff, the prayer for additional evidence loses its force and cannot be favoured. Moreover, calling for such records now as additional evidence would amount to collection of evidence in favour of a party. If any party, who was legally duty bound to produce a document does not produce it, necessary inference can follow. The prayer for additional evidence is accordingly rejected.

9. Admittedly, there was a previous award passed by the ARCS, Cuttack against the Appellant and one Achuta Sukla and that award was put to execution in the Court of learned Munsif, Athagarh in Execution Case No. 7 of 1953 and in that execution proceeding vide order in Misc. Case No. 27/53 u/s 47, Code of Civil Procedure, the said award was held unexecutable. After this order, Defendant No. 17 sought for assistance of the ARCS, Cuttack for resolving the dispute of the Society against the Plaintiff and the auction purchaser, Gobinda Panda. It is also admitted that the ARCS, Cuttack registered the said dispute as Dispute Case No. 57/M of 1955-56 and referred the dispute to the Arbitrator, Mr. B. Kar for settlement and the said arbitrator passed the award against the Plaintiff and Achuta Sukla. Now the allegation of the Appellant is that once a previous award of the ARCS, Cuttack was declared invalid and without jurisdiction, the same ARCS, Cuttack had no legal jurisdiction to entertain the dispute or refer the same to arbitrator. It is also claimed by the Appellant that the ARCS had no authority to entertain or refer the dispute and Mr. S. Kar was also legally incompetent to act as Arbitrator as he was one of the Directors of the Co-operative Society, Defendant No. 17.

10. In Misc. Case No. 27 of 1953, learned executing Court observed that the award was passed without jurisdiction for which the sale effected in the execution proceeding was a nullity. When a competent Court said that the award was passed without jurisdiction, there was no legal bar for Defendant No. 17 to raise a dispute before the appropriate authority and for that reason, the order passed in Misc. Case No. 27 of 1953 cannot operate as res judicata or estop the Defendant No. 17 from raising the dispute before the appropriate authority. Section 71 of the Orissa Co-operative Societies Act, 1951 (Section 68 of the Orissa Co-operative Societies Act, 1962) speaks about settlement of disputes. This Section essentially says that any dispute touching the constitution, management or the business of a Society shall be referred to the Registrar, if the parties thereto are among the following, namely-

(i) the Society, its Committee, past Committee, any past or present officer or office-bearer, any past or present agent, any past or present servant or the nominee, legal heir or representative of any deceased Officer, officer-bearer, deceased agent or deceased servant of the Society; or

(ii) a member, past member, or a person claiming through a member, past member or deceased member of the Society, or of a Society which is a member of the Society; or

(iii) a surety of a member, past member or a deceased member whether such

surety is or is not a member of the Society; or

(iv) any other Society.

In the present case, the dispute was between the Society and the Plaintiff, who was its member, along with the surety of the Plaintiff and the purchaser of the mortgaged property of the Plaintiff in the auction sale. Such dispute is squarely covered under the provisions of Section 71 of the Act, 1951.

11. The definition of "Registrar" has been provided u/s 2 of the Act, 1951, which reads as follows:

"Registrar" means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act;

Section 8 of the Act, 1951 (Section 3 of the Act, 1962) says that the State Government may appoint a person to be Registrar of Co-operative Societies for the State of Orissa and may appoint persons to assist him. Sub-section (2) further clarifies that the State Government may by general or special order confer on any person appointed under Sub-section (1) to assist the Registrar all or any of the powers of the Registrar under the Act to be exercised within such local limits as may be assigned by the Registrar and that every person appointed to assist the Registrar would exercise the power conferred on him subject to general superintendence and control of the Registrar. In the Orissa Co-operative Societies Rules, the State Government have appointed Additional Registrar, Joint Registrar, Deputy Registrar and Assistant Registrar of Co-operative Societies to assist the Registrar. That being the position, the ARCS, Cuttack was the person appointed and designated by the State Government to exercise the powers of the Registrar and had the legal authority to entertain and refer the dispute to Arbitrator. Rule 90 Sub-rule (5) of the Orissa Co-operative Societies Rules provide that one of the members of the Co-operative Society can act as Arbitrator. So there was no legal bar for Mr. Kar, who was admittedly a member and the Director of the Banki Traders" Co-operative Society, to act as an Arbitrator.

12. The next grievance of the Appellant is that in the execution proceeding notices were suppressed and the disputed land was sold to Respondent No. 17 clandestinely. It is also alleged that the sale certificate was never issued and delivery of possession of the disputed land was never given to Respondent No. 17, as a result of which Respondent No. 17 never acquired any title over the suit property.

It is found from the pleading of the Plaintiff that he had knowledge about the Dispute Case No. 57-M/1955-56 wherein he challenged the jurisdiction of the ARCS, Cuttack and the jurisdiction of the Arbitrator to pass the award. He also filed objection in the arbitration proceeding. In the execution case, the Plaintiff appeared and filed a petition for time to make payment, but ultimately did not pay any amount, for which the land was put to auction sale. So, there is no

scope to say that the arbitration proceeding and the following execution proceeding were undertaken suppressing the notice and that the Plaintiff-Appellant had no knowledge about those proceedings. Admittedly, the Plaintiff did not prefer any appeal against the award, although there was a provision in the Act to challenge any award in the appeal. The Plaintiff did not file any proceeding for setting aside the sale, which had been effected in favour of Respondent No. 17 in the execution proceeding although Section 109 of the Act, 1951 provides scope for the judgment debtor to file application to set aside the sale within a prescribed period. Sections 114 and 115 of the Act, 1951 provide that when a sale is effected in an auction and no application is filed for setting aside the same and the awarded amount is also not deposited by the judgment debtor, then certificate of sale can be issued and delivery of the property can be given to the purchaser. In the present case, the sale certificate and writ of delivery of possession were not produced. The Society is the custodian of such document. The said Society as Defendant No. 17 did not appear to contest the suit. So, there was no scope for the purchaser, Defendant No. 1 to produce those documents. However, one letter, Ext. M was produced in support of delivery of possession. In that letter the Secretary of the Society has written to the President that after sale was confirmed, delivery of possession of the suit land was given to Respondent No. 17. The genuineness of Ext. M was beyond dispute, as it carries the signature of the Secretary and seal of the Society. The signature of the Secretary was also proved as genuine. Besides this document, the witnesses D.Ws. 2,3 and 4 also spoke about the delivery of possession of the disputed land to Respondent No. 17. The signatures of these witnesses on Ext. M were also proved. In this regard, the Plaintiff-Appellant asserted that he was all along in possession of the suit land till 1969 and was cultivating these lands through bhag chasies. He also claimed that the letters, Exts. 3 and 4 sent to him by the Society were there to show his possession over the suit land during the period of 1960-64. The claim of Plaintiff. P.W. 1 stood contradicted by his own earlier statement, which were available in Ext. F and the Sanja patta, Ext. P. P.W. 2 and 3 stated about possession of the Plaintiff over the suit land through bhag chasies, but these witnesses were not reliable because they had animosity and litigation with Defendant No. 1 and his family members and their statements were also not in full agreement with the earlier plea in 145, Code of Criminal Procedure proceedings and the complaint case. Ext. 3 is a letter written by the Secretary of the Society demanding Rs. 3,000/- from the Plaintiff towards Sanja dues for the year 1962-64. Ext. 4 is a letter by the same Secretary to the Plaintiff alleging that though the suit land has been purchased by the Co-operative Society, the Plaintiff was taking away the crop from that land. These letters do not prove any admission of the Society about the possessory right of the Plaintiff over the suit land. On the contrary, these letters show that the Society claimed possession over the suit land as owner thereof and indicated that the Plaintiff, who was given opportunity to cultivate the same on sanja basis was not paying the dues. It is worthwhile to note that the Plaintiff himself sent petition, Ext. G admitting the sale of the suit land in favour of the Society and

requesting for giving him an opportunity to pay off the dues. He also filed dispute case No. 2 of 1955-56 before the Deputy Registrar, Co-operative Societies and then appeal before the Registrar, Co-operative Societies for re-conveyance of the suit land to him. Once these documents are considered in a cumulative manner, one can safely infer that the Plaintiff was not only aware of the sale suit land in favour of Respondent No. 17, but also acknowledged the ownership of Respondent No. 17 over the suit land and requested the Co-operative Society as well as the authorities to give back the land to him on payment of the outstanding dues. From the aforesaid facts as well as on perusal of the document Ext. M, the rent receipts Ext. N series, and the evidence of the D.Ws., who are independent persons, there remains no doubt that delivery of possession of the suit land was effected and the Respondent No. 17 got possession of the suit land though for some years thereafter, it had allowed the Plaintiff to cultivate that land on sanja basis. That being the situation, Defendant No. 17 had acquired valid title over the suit land. There is no dispute that Defendant No. 17 executed the sale deed, Ext. K in favour of Defendant-Respondent No. 1 and that Defendant-Respondent No. 1 is in possession of the said land since 1969. The certified copies of the orders passed in the proceeding u/s 145 Code of Criminal Procedure and the complaint case show that those Courts found possession of Defendant No. 1 over the suit land. The D.Ws. also clearly stated that soon after sale transaction, Defendant No. 1 took possession of the suit land and he is continuing in possession. The rent receipts, Ext. N series, also support this plea to some extent. In such a situation, the observation of the trial Court that Defendant No. 1 acquired valid title over the suit land cannot be said to be far fetched or imaginary.

13. Admittedly, the dispute was referred to ARCS, Cuttack, who sent it for arbitration and there was award in the arbitration proceeding. The said award was put to execution and in that execution proceeding the suit land was sold by way of auction sale. The Plaintiff did not prefer any appeal against the award and also did not file any application within the prescribed time for setting aside the sale. On the contrary, he approached the DRCS and then Registrar, Co-operative Societies for re-conveyance of the suit land to him, which prayer was successively rejected. Section 112 of the Act, 1951 clearly says that when the sale has been made u/s 91, 105 or 108 and has been confirmed, the title of the purchaser cannot be questioned in any Court by any person whose interest has been sold or his successor in interest on any ground whatsoever. In the above noted scenario, there was no scope for the Civil Court to entertain the suit of the Plaintiff. Learned Counsel for the Appellant argued that Civil Court has general jurisdiction u/s 9, CPC and it can entertain the suit to find out if the statutory Tribunal acted without jurisdiction or did not follow the established principle of judicial procedure. There is no dispute that the Registrar and Assistant Registrar are the statutory authorities to entertain dispute, decide the dispute and pass award. As has been indicated earlier, the Plaintiff had due notice of the proceedings and he had filed objection. So, the principle of natural justice cannot

be said to have been violated nor can it be said that those authorities did not act in accordance with the established principle of judicial procedure. Learned trial Court was thus justified in observing that the Civil Court had no jurisdiction to entertain the suit.

14. As has already been indicated earlier, the Plaintiff-Appellant did not prefer any appeal against the award of the Arbitrator and did not file any petition to set aside the sale. In that situation, learned trial Court was perfectly justified in saying that the Plaintiffs suit was hit under the principle of waiver, acquiescence and estoppel. Similarly the Plaintiff did not file any suit or proceeding for setting aside the sale within the period prescribed under the Co-operative Societies Act as well as the Limitation Act. In fact, the suit was filed beyond the period of 3 years from the date of auction sale in the execution proceeding. Therefore, the finding of the trial Court that the suit is barred by limitation is also legally correct.

15. The foregoing discussions show that the issues were properly decided by the learned trial Court. Accordingly, the appeal is found to be without any merit and is dismissed on contest with cost.