
(2015) 09 OHC CK 0025
In the Orissa High Court
Case No : Writ Petition (C) No. 193 of 2008

Sarat Chandra Barik and Others

APPELLANT

Vs

Manoranjan Barik and Others

RESPONDENT

Date of Decision : 11-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2)
Constitution of India, 1950 — Article 227
Limitation Act, 1963 — Section 21

Citation : (2015) 2 ILR Ori 953

Hon'ble Judges : Akshaya Kumar Rath, J

Bench : Single Bench

Advocate : Soumya Mishra, Advocate for S.P. Mishra, Senior Advocate, for the Appellant; D. Deo, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. Akshaya Kumar Rath, J—Assailing the order dated 6.9.2007 passed by the learned Civil Judge (Sr. Division), Baripada in Civil Suit No. 208 of 2005, defendant Nos. 1 and 2 have filed the instant petition under Article 227 of the Constitution of India. By the said order, the learned trial court allowed the application of the defendant No. 7 filed under Order 1 Rule 10(2) C.P.C. to transpose him as plaintiff.

2. Bereft of unnecessary details, the short fact of this case is that one Smt. Basanti Barik instituted a suit for declaration of right, title and interest, for a declaration that the sale deed dated 17.9.1993 executed by the defendant Nos. 3 to 6 in favour of defendant No. 1 and the sale deed dated 11.6.2004 executed by the defendant No. 1 in favour of defendant No. 2 as null and void in the court of the learned Civil Judge (Sr. Division), Baripada, which is registered as C.S. No. 208 of 2005. In the said suit, sons of the plaintiff have been arrayed as defendants 3 to 7. Pursuant to issuance of notice, defendants 1 and 2 entered appearance and filed a comprehensive written statement denying the assertions

made in the plaint. While the matter stood thus, the sole plaintiff died on 9.1.2006. Defendant No. 7, son of the plaintiff, filed an application under Order 1, Rule 10(2) of C.P.C. for transposition as plaintiff. Defendants 1 and 2 filed objection to the same. By order dated 6.9.2007, vide Annexure-3, the learned trial court allowed the application and transposed the defendant No. 7 as plaintiff.

3. Heard Mr. Soumya Mishra on behalf of Mr. S.P. Mishra, learned Senior Advocate for the petitioners and Mr. D. Deo, learned counsel for the opposite party No. 1.

4. Mr. Mishra, learned counsel for the petitioners submitted that defendant No. 7 has neither filed any written statement in support of the claim of the plaintiff, nor challenged the sale transactions within the prescribed period of limitation and as such his right to property has been extinguished. He further submitted that consequent upon the death of the plaintiff, the right accrued in favour of defendant Nos. 1 and 2 cannot be taken away by transposing the defendant No. 7 in place of plaintiff. He further submitted that transposition of defendant No. 7 as plaintiff was far beyond the period of limitation for seeking the relief as claimed by the original plaintiff.

5. Per contra, Mr. Deo, learned counsel for the opposite party No. 1 supported the order dated 6.9.2007 passed by the learned Civil Judge (Sr. Division), Baripada.

6. The provisions of Order 1 Rule 10(2) C.P.C. pertaining to adding or striking off the parties would include transposing of parties as well. In exercise of the power under Order 1 Rule 10(2) C.P.C., the Court may transpose defendant as plaintiff. It is not necessary that defendant must have filed a written statement before he can be allowed to be transposed as a plaintiff.

7. In Piyush Hasmukhlal Desai Vs. International Society for Krishna Consciousness (ISKCON) AIR 2015 Ori 43 , a Division Bench of this Court, where Dr. A.K. Rath was a party, held that transposition of defendant as plaintiff can be made only when the defendant has some interest in common with that of the plaintiff. A pro forma defendant can be transposed as plaintiff only when interest and identity are the same between the plaintiff and one or more of the defendants. A person, whose interest is adverse to the plaintiff, cannot be permitted to be transposed as plaintiff. Be it noted that SLP No. 16533 of 2015 filed by the appellant before the apex Court against the aforesaid judgment was dismissed on 16.07.2015.

8. The submission of Mr. Mishra, learned counsel for the petitioners that transposition of defendant No. 7 as plaintiff was far beyond the period of limitation is difficult to fathom. In Mukesh Kumar and Others Vs. Col. Harbans Waraich and Ors, AIR 2000 SC 172 : (2000) 1 CTC 176 : (1999) 8 JT 563 : (2000) 124 PLR 179 : (1999) 6 SCALE 644 : (1999) 9 SCC 380 : (1999) 4 SCR 141 Supp : (1999) AIRSCW 4260 : (1999) 9 Supreme 338 , the apex Court held that section 21 of the limitation has no application to cases of transposition of

parties. Since the transposition also involves addition of a plaintiff or a defendant as the case may be, into the suit as originally filed, sub-sec. (2) of Sec. 21 of the Limitation Act applies only to those cases where the claim of the person transposed as plaintiff can be sustained or the plaintiff as originally filed or where person remaining as a plaintiff after the said transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. Paragraph 9 of the report is quoted hereunder:

"9. Section 21 of the Limitation Act provides that wherever on institution of a suit a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he is so made a party. However, if Court is satisfied that omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. Sub-sec. (2) thereof makes it very clear that these provisions would not apply to a case where a party is added or substituted owing to assignment or devaluation of any interest during the pendency of the suit or where plaintiff is made a defendant or a defendant is made a plaintiff. Section 21 has no application to cases of transposition of parties. Since transposition also involves addition of a plaintiff or a defendant as the case may be, into the suit as originally filed, sub-sec. (2) of S. 21 of the Limitation Act applies only to those cases where the claim of the person transposed as plaintiff can be sustained on the plaintiff as originally filed or where person remaining as a plaintiff after the said transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. For sub-sec. (2) to apply all that is necessary is that suit as filed originally should remain the same after the transposition of the plaintiff and there should be no addition to its subject matter. Where a suit as originally filed is properly framed with the proper parties on record the mere change of a party from array of defendants to that of plaintiffs under Order 1 Rule 10 of the Civil Procedure Code will not make him a new plaintiff and will not bring the case within this Section and in such a case Sub-section (2) will not apply."

9. Defendant No. 7 has no adverse interest with the plaintiff, her mother. The interest and identity are the same between the plaintiff and defendant No. 7. Thus, the learned trial court has rightly allowed the application of defendant No. 7 under Order 1 Rule 10(2) C.P.C.

10. In the ultimate analysis, the petition, sans any merit, deserves dismissal. Accordingly, the petition is dismissed. No costs.