
(2010) 03 OHC CK 0065
In the Orissa High Court

Shri Raj Kishore Subudhi alias Barik

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-03-2010

Acts Referred:

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 —
Section 36, 37, 37(1), 4, 41

Citation : (2010) 2 ILR (Ori) 194 : (2010) 2 OLR 76

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Judgement

S.K. Mishra, J.—The short question which arises in this writ petition is whether the Commissioner, Consolidation has the jurisdiction to entertain a revision u/s 37(1) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, hereinafter referred to as the "Act" for brevity, after the final notification u/s 41(1) of the Act.

2. Briefly stated the facts that led to filing of this writ petition are as follows:

Plot No. 2216 measuring an area Ac.0.25 decimals and plot No. 2213 measuring an area of Ac.0.07 decimals pertaining to sabik khata No. 651 of mouza-Beraboi, PS-Delanga, district Puri was purchased by Rani Barik through a registered sale deed dated 01.08.1945. After her death, the petitioner opposite party No. 3 became absolutely owner of the same. They possessed the suit schedule property till 02.04.1998. Thereafter, the schedule property was partitioned and sabik plot No. 2216 has been divided into two hal plots, i.e. hal plot Nos. 1132 and 1133. The case of the petitioner is that the area of the said hal plots was decreased to Ac.0.03 decimals. In other words, in the hal record of right, only an Ac.0.22 decimal is recorded.

On 23.09.2003, the opposite party No. 3 alienated his property measuring Ac.0.11 decimals of land from hal plot No. 1133, hal khata No. 35 to the opposite party No. 2. The opposite party No. 2 filed a mutation case before the learned Tahasildar, Pipili for recording his name on the basis of such sale.

Petitioner further pleads that when the consolidation map was published he compared it with the sabik (1927-28) major settlement map and came to know that there is no error in the map. The area has remained intact measuring Ac.0.25 decimals. It is further pleaded that the corresponding area of hal plot Nos. 1132 and 1133 has also remained intact measuring Ac.0.25 decimals but in the record of rights wrongly reduced area has been reflected. Thereafter, the petitioner filed a petition u/s 37(1) of the Act before the Commissioner, Consolidation, Orissa, Bhubaneswar for correction of the area on the strength of the registered sale deed dated 29.05.1936 under which the predecessor in interest of late Rani Barik had purchased the schedule property.

The grievance of the writ petitioner is that the Commissioner, Consolidation holding that the petitioner has not raised such a claim when the partition was effected in 9(3) stage and that after notification u/s 41(1) of the Act, the Consolidation authorities are not empowered to adjudicate the civil disputes, dismissed the Revision Petition.

3. Opposite parties 2 and 3 have filed separate counter affidavits. The substance of both the counter affidavits may be stated briefly as follows:

The petitioner and the opposite party No. 3 are brothers and enjoy equal share over the schedule property belonging to their ancestor. There is also no dispute that the petitioner and the opposite party No. 3 had effected partition of their ancestor property in question during the consolidation operation in the year 1982 by filing an application u/s 9(3) of the Act. While carving "Chakkas" in the mouza, the present property was excluded from being part of any "Chakka" but the original sabik plot Nos. 2216 and 2219 in mouza Rench appertaining to khata No. 615 was bifurcated into two plots bearing Nos. 1132 and 1133 which corresponds to plot No. 2216, measuring an area of Ac.0.11 decimals each, whereas plot No. 2219 was divided into plot Nos. 1134 and 1135 measuring an area of Ac.0.04 decimals, By way of such operation, the petitioner became owner of plot Nos. 1132 and 1133 and the opposite party No. 3 became the owner of the plot Nos. 1133 and 1135 and the parties were in peaceful possession in their respective plots and exercised their right, title and interest without any dispute from any corner.

After publication of the record of rights, finalization of the map and expiry of the objection period, consolidation operation were declared to be closed in the year 2002, as per a notification u/s 41(1) of the Act. After such closure of the consolidation operation, the petitioner in 2003 applied for conversion of the lands fallen into his share for homestead purpose and after obtaining such permission constructed house over plot No. 1132 and has retained the area as per his possession in respect of the area mentioned in the ROR.

During such period the opposite party No. 3 sold the land allotted to the share to the opposite party No. 2 through a registered sale deed on 23.09.2003 and handed over possession to the opposite party No. 2. Since then, the opposite

party No. 2 is in possession of the land in question.

It is further pleaded that when the opposite party No. 2 started constructing his residential house, the petitioner raised an objection for the first time alleging that he has certain extent of land remaining with the said land purchased by him and filed a Civil Suit bearing C.S. No. 92 of 2005 before the learned Civil Judge (Senior Division), Puri, inter alia, praying therein for a declaration to the effect that the plot No. 1132 measuring Ac.0.15 1/2 decimals and recovery of Ac.0.2 1/2 decimals of property from the plot No. 1133, inter alia, praying for easementary right over the suit schedule property. Petitioner also filed an application for interim injunction but the prayer was rejected. He also approached the appellate Court against such order. The opposite parties, therefore, claimed that the writ petition is not maintainable and the same should be dismissed.

4. While dismissing the revision application filed by the petitioner learned Commissioner, Consolidation, Orissa, Bhubaneswar in Consolidation Revision Case No. 272 of 2006, reasoned as follows.

4.0. Considered the merit of the case. The petitioner has not raised such claim when partition was effected in 9(3) case No. 1849 to 1981. He has never filed any appeal against the order passed in the above 9(3) case. The Consolidation authorities have prepared the map and record after due field enquiry. It is a well-settled principle of law that when the whole plot will be transferred, the vendee will get the benefit of the actual area. Moreover, Consolidation Operation of the village has been closed u/s 41(1) of the Act since, 2002. The Consolidation authorities are not empowered to adjudicate the matter after such notification which is supported by the decision reported in 2003 (Supp.) OLR 882. A Civil suit bearing C.S. No. 92/2005 is now pending before the Civil Judge (Sr. Division), Puri for the same relief.

5. As far as the jurisdiction of the Commissioner, Consolidation after publication of Section 41(1) notification, u/s 37(1) of the Act is concerned, the matter is no more res Integra. It has been settled by the full Bench of this Court in Gulzar Khan Vs. Commissioner of Consolidation and Others, . While considering the powers of the Civil Court and the Commissioner after notification u/s 41(1), the full Bench has held that the Civil Court's jurisdiction would be available after closure of consolidation operation only in any of the following circumstances, namely,

- i. The cause of action accruing after the closure of the consolidation operations.
- ii. If the consolidation authority has taken the decision without complying with the provisions of the Act or has not acted in conformity with fundamental principles of judicial procedure which would be taken to be case of the violation of natural justice and
- iii. Obtaining order from the hand(s) of consolidation authorities by playing fraud

on the party who seeks to approach the Civil Court.

6. The full Bench of this Court in Gulzar Khan's case took note of provisions of Sections 41, 51 and 36 of the Act and held that any order passed u/s 36 should not be called in Court of law. Section 51 provides that notwithstanding anything contained in any other law for the time being in force but subject to the provisions contained in Clause (3) of Section 4 and Sub-section (1) of Section 7, all questions relating to right shall be decided under the provisions of the Act and no Civil Court in a proceeding in respect of any matter which is an officer or authority empowered under the Act is competent to decide. The full Bench then raised the question and held that however it is apparent, if any cause of action were arose after closure of the operation, it is the Civil Court which has to be approached because in that case the consolidation authorities could not be available. That apart, if the case which attracts Clause i and iii of the preceding paragraph, then also the Civil Court could entertain a suit. In no other case, the Civil Court can entertain in question relating to the civil disputes between the parties.

7. However, a party cannot be left without a forum. The principle of *ubijus ibi remedium* means that there is no wrong without a remedy. Whenever there is a right there is a forum for its enforcement. Therefore, the full Bench of this Court in the aforesaid case held that a forum has to be available to a person, who was to be aggrieved, after the Section 41 notification has been issued, with an order having been passed or anything having been done during the consolidation operations affecting his right, title and interest and accordingly the remedy can be made available principally by Section 37 of the Act. The full Bench has also reflected as to when a situation may arise, need not be spelt out, indeed, it cannot be. Thus, this Court in the aforesaid case held that the Commissioner, Consolidation has the jurisdiction u/s 37 to decide a case depending upon facts and circumstances of that case even after the Section 41(1) notification.

8. The ratio laid down is squarely applicable to this case. It is not the case of the petitioner that cause of action arose after closure of consolidation operation or the consolidation authorities had not acted in conformity with the fundamental judicial procedure or orders have been obtained from the consolidation authority by applying fraud. His simple case is that though a particular measure of land is in his possession and the same has been reflected in the consolidation map, the record of right issued in his favour reflects a reduced extent of land. Whether the petitioner has a remedy for ventilating his grievance? The answer is an emphatic yes and the Commissioner, Consolidation Commissioner is to decide, whether the petitioner is entitled to the relief claimed.

9. The other reason which was considered by the Commissioner, Consolidation is that the petitioner has not raised such an objection in 9(3) proceeding stage. But a careful consideration of the facts and circumstances of the case reveals the fact that the consolidation map reflects the exact measure of land came to the knowledge much after 9(3) objection stage. So the Commissioner Consolidation

was clearly in error in holding that the absence of raising objection in 9(3) stage should be a bar to further agitate the matter.

Thus, this Court comes to the conclusion that the reasons resorted to by the learned Commissioner, Consolidation are clearly erroneous and, therefore, the order impugned, should be interfered with. The order impugned as at annexure-1 is, therefore, set aside and the matter is remitted back to the Court of the Commissioner, Consolidation, Orissa, Bhubaneswar. Learned Commissioner is directed to hear the parties afresh and decide the case on merit, as expeditiously as possible. Parties are directed to appear before the learned Commissioner Consolidation on 08.04.2010.