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**(1990) 02 OHC CK 0014**  
**In the Orissa High Court**  
**Case No : First Appeal No. 16 of 1979**

Smt. Chandra Kumari Devi (dead) after her, legal representative Sri. Tapi Singh Bhoi APPELLANT

Vs

State of Orissa and Others RESPONDENT

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**Date of Decision :** 26-02-1990

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 2(2), 2(3), 80

**Citation :** (1990) 69 CLT 679

**Hon'ble Judges :** V. Gopalaswamy, J; S.C. Mohapatra, J

**Bench :** Division Bench

**Advocate :** Ashok Das, S.N. Satpathy and D.K. Mohapatra, for the Appellant; G. Rath, General and Addl. Standing Counsel, for the Respondent

**Final Decision :** Allowed

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## Judgement

S.C. Mohapatra, J.—Plaintiff is the Appellant in this First Appeal against the decision of the Trial Court dismissing the suit for mesne profits. During pendency of this appeal, Plaintiff having expired, her legal representative has been substituted.

2. Case of the Plaintiff relevant for this appeal is that she is the widow of the intermediary of Bangamuda estate in Bolangir District. While the estate was part of erst-while Patna State, her husband died and management of the estate was taken over by the Durbar. At that stage the princely state merged. On 1-1-1948 with Dominion of India and administration of the estate was taken over by the provincial administration of Orissa. However, the properties in respect of which mesne profit is being claimed in six villages were granted to the Plaintiff as life estate. Despite the same, the land in the six villages was forcibly possessed by State Government to recover which she had to file Title Suit No. 13 of 1965 and ultimately got back possession by executing the decree in Execution Case No. 73 of 1966 on 21-1-1968. After obtaining the decree on 23-7-1966, she issued notice u/s 80, Code of Civil Procedure, On 9-11-1966 for payment of the mesne

profit on account of illegal possession and no action being taken, she filed an application to sue in forma pauperis on 28-7-1967 which being allowed, the suit was registered as Money Suit No. 8 of 1968. In the suit Plaintiff claimed realisation of Rs. 2,65,520/- towards mesne profits. This consists of Rs. 1,08,000/- the accumulated amount from 1955 to 1967 in deposit in the Treasury, Rs. 1,57,520/- profits for the year 1964-65, 1965-66 and 1966-67 at the rate of Rs. 52,8401- per year.

3. Case of the Defendants is that suit lands were Bhogra lands belonging to the State. After merger on 1-1-1948, Administrator moved the Provincial Government on 1-12-1948 to grant the rents of the lands towards her maintenance and Provincial Government accepted the same on 21-8-1949. However, Sub-divisional Officer misinterpreting the letter gave possession to the Plaintiff. When the mistake was clarified, possession was taken back.. Thus, Plaintiff has no right over the land to make the claim. It was also asserted that the suit is not maintainable. Under Order 2, Rule 2, Code of Civil Procedure, claim is barred by limitation and no notice u/s 80, CPC having been served, suit is not maintainable.

4. Trial Court held that no notice u/s 80, CPC has been given and served on the Defendants, suit is hit under Order 2, Rule 2, Code of Civil Procedure, Suit is barred by limitation in respect of a portion of the claim and in spite of the fact that State Government was leasing out portion of the land in different years to different persons, the land being Bhogra, Plaintiff is not entitled to compensation.

5. Mr. S. N. Satpathy, learned Counsel for the Appellant assailed each of the findings while learned Advocate General supported the findings in his submissions. Accordingly, correctness of the aforesaid findings of the trial Court require consideration in this appeal.

6. As regards the finding that no notice u/s 80 CPC has been given or served, Plaintiff specifically pleaded that notice u/s 80, CPC has been served. This is in compliance with Order 6, Rule 11, CPC which requires that it shall be sufficient to allege such notice as a fact. Originally in the written statement verified by the Collector, there was no specific denial that no such notice has been served. It was only asserted that notice has not been validly served. After amendment of the plaint, when Defendants got chance in the additional written statement verified by the Additional District Magistrate it was stated that notice was not served. Since notice u/s 80, CPC is a condition precedent to the maintainability of the suit Plaintiff proved copy of the notice u/s 80, CPC which was marked Ext.

7. Besides, Plaintiff herself and p. w. 11 stated the circumstances from which inference can be drawn that such notice has been served. Plaintiff stated that she instructed her Advocate to issue the notice. P. w. 11 an Advocate's clerk stated that Plaintiff's Advocate gave her the notice and he sent it by registered post on 9-11-1966. He also further stated that the postal receipt was handed over by him to his Advocate. Trial Court disbelieved the same since the receipt was not

proved. Absence of production of receipt may be a circumstance to draw adverse inference. However, Court is not bound to draw such adverse inference where evidence is otherwise clear. In this case, oral evidence as discussed above is so clear that we are inclined to accept that notice had been served on the Defendants. Finding of the trial Court in this respect cannot be sustained.

7. Next finding of the Trial Court that suit is barred under Order 2, Rule 2, CPC requires consideration. There is no dispute that Plaintiff filed Title Suit No. 13 of 1965 for declaration of title and recovery of possession of the lands in respect of which this suit is filed. Ext. 1 is the judgment in the said suit. When the suit was filed Plaintiff could have claimed for the relief as claimed in this suit. Under Order 2, Rule 2(2), CPC Plaintiff normally shall not entitle to sue for such claim which has been omitted. However, Order 2, Rule 2(3), CPC makes an exception. It provides that a person entitled to more than one relief in respect of the same cause of action may sue for all or any of the reliefs, but if he omits, except with leave of the Court, he shall not sue for any relief so omits. Nothing has been provided in this sub-rule as to the stage when such leave is to be obtained. It is seen from Ext. 1 that in the judgment itself leave has been given to Plaintiff to sue for mesne profits subject to limitation. Thus, the bar in Sub-rule (2) is taken away by grant of such leave. Trial Court was not justified in dismissing the suit on this ground which is reversed. We are inclined to hold that Order 2, Rule 2(2), CPC does not stand as a bar to the maintainability of the suit.

8. Trial Court dismissed the suit as the relief claimed is barred by limitation in respect of all claims except mesne profits for the period between 1965-66 and 1966-67. Limitation for a suit of this nature is three years from the date when the amounts or profits were receivable by the Plaintiff. Suit having been deemed to have been filed on 28-7-1967 when the application for permission to sue in forma pauperise was filed. Claims on or after 26-7-1964 would be within the period of limitation. Profits of the land would be receivable after harvest which is ordinarily made in the month of November, December and January. Thus, claim of the Plaintiff for the years 1964-65, 1965-66 and 1966-67 are within the period of limitation. To this extent, finding of the Trial Court is modified.

9. In the copy of notice u/s 80, CPC (Ext. 7) Plaintiff claimed profit for the years 1964-65, 1965-66 and 1966-67. Since there is no other claim made in the notice, Plaintiff would not be entitled to reliefs other than those made in the notice u/s 80, Code of Civil Procedure. It is not permissible to enlarge the claim beyond what has been made u/s 80, Code of Civil Procedure. On this ground also Plaintiff would be entitled to mesne profits for the years, 1964-65, 1965-66 and 1966-67 only and no other claim in the suit.

10. It is no doubt true that onus lies on the Plaintiff to prove his claim by proving the loss she sustained for deprivation of the land which she was entitled to possess. In the present case, Government officials had taken possession of the property in the suit. There is no acceptable evidence that they mismanaged the property. There is clear evidence that the properties were put to auction

annually. Since Government officials were dealing with the property as if it is of the State Government, clear record of leave amount, receipts and expenses would be available. Defendants ought to have proved from their own records the amounts receivable and received as lease amount for these three years and the expenses incurred for collection of the same. In the circumstances of this case Defendants ought to get an opportunity to prove the same on the basis of which a decree can be passed in favour of the Plaintiff. In case Defendant would not avail the opportunity given to them, trial Court shall make a reasonable assessment of the same after giving opportunity to the Plaintiff to adduce further evidence in the regard. Accordingly, while setting aside the judgment, we remit back the suit where the Defendants would be directed to produce and prove registers and accounts in respect of the amounts received or receivable by them and probable expenditure incurred for the same for the years 1964-65, 1965-66 and 1966-67. Since the suit is of the year 1967, we have no doubt that the trial Court shall decide the question before ensuing Supper Vacation.

11. In the result, appeal is allowed in part. Both parties are directed to appear before the trial Court on 16-4-1990 on which day trial Court shall fix a date for giving opportunity to the parties to prove the case indicated in this judgment. Parties shall bear their own costs.

V. Gopalaswamy, J.

I agree.

Appeal allowed.