
(2012) 05 OHC CK 0020

In the Orissa High Court

Case No : Writ Petition (C) No. 24441 of 2011 and W.P. (C) No. 29756 of 2011

Smt. Rita Rani Mishra and Others

APPELLANT

Vs

Sachidananda Badhei and Others

RESPONDENT

Date of Decision : 03-05-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 4, Order 22 Rule 4(2), Order 6 Rule 17
Constitution of India, 1950 — Article 227

Citation : (2013) 115 CLT 81

Hon'ble Judges : C.R. Dash, J

Bench : Single Bench

Advocate : Gautam Mishra and D.K. Patra, for the Appellant; C. Ananda Rao and S.K. Behera, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Dash, J.—Orders Dated 02.07.2011 & 16.08.2011 passed by Learned Civil Judge (Senior Division), Sambalpur in Title (Eviction) Suit No. 118 of 1997 declining to accept the written statement filed by the Petitioners were challenged initially in W.P. (C) No. 24441 of 2011, Subsequently, Learned Counsel for the Petitioners having confined W.P. (C) No. 24441 of 2011 to aforesaid Order Dated 02.07.2011, filed W.P. (C) No. 29756 of 2011 to impugn the Order Dated 16.08.2011. As both the Writ Petitions arise out of the orders passed on two occasions, i.e., 02.07.2011 & 16.08.2011 in the same suit, they are taken up together for disposal by this common Judgment, with consent by Learned Counsels for the parties.

2. Present Opp. Party No. 1, as Plaintiff, filed Title (Eviction) Suit No. 118 of 1997 in the Court of Learned Civil Judge (Senior Division), Sambalpur against Basanta Kumar Mishra (Defendant No. 1) & Kairu Khamari (Defendant No. 2) for declaration of title & for eviction of Basanta Kumar Mishra from the suit schedule land. The basis of claim of the Plaintiff is that he had purchased the suit land

from Kairu Khamari (Defendant No. 2). Defendant No. 1 Basanta Kumar Mishra filed written statement denying the plaint averments & claimed to have perfected his title by adverse possession against Kairu Khamari as well as the Plaintiff. During pendency of the suit, Defendant No. 1 Basanta Kumar Mishra died. The Plaintiff impleaded his widow & two sons as Defendant No. 1 (a) to 1 (c) present proforma Opp. Party Nos. 2, 3 & 4 respectively). Plaintiff also impleaded Jagnyaseni Mishra (present Petitioner No. 3) as Defendant No. 1 (d) wrongly describing her as wife of Prasanna Kumar Panda, whereas she is in fact wife of one Sudhanshu Sekhar Mishra Petitioner No. 1 Smt. Rita Rani Mishra, Petitioner No. 2 Smt. Smitarani Nayak & Petitioner No. 4 Smt. Bigyaseni Hota are the three daughters of the original Defendant No. 1 late Basant Kumar Mishra, who were left unimpleaded through substitution. The aforesaid three daughters of original Defendant No. 1 late Basanta Kumar Mishra, therefore, filed an application under Order 1, Rule 10, C.P.C. to implead them as Defendants, in the said petition, Petitioner No. 3 Jagnyaseni Mishra also made a prayer to make necessary correction so far as name of her husband is concerned.

3. Learned Trial Court, vide Order Dated 11.01.2011, dismissed the petition filed by the present Petitioners under Order 1, Rule 10, C.P.C. obliging them to approach this Court in W.P. (C) No. 1821 of 2011. Said Writ Petition was disposed of on 17.02.2011 remitting the matter back to Learned Court below with a direction to re-hear the parties & pass order afresh. On remand, the matter was taken up for hearing & Learned Court below allowed the petition filed by the Petitioners under Order 1, Rule 10, C.P.C. & directed the Plaintiff to take necessary steps for adding the present Petitioners as Defendants, who were to file written statements on 02.06.2011. The Petitioners filed their written statement on 20.06.2011. Vide Order Dated 02.07.2011 (impugned in W.P. (C) No. 24441 of 2011), Learned Court below refused to accept the written statement. The Petitioners thereafter filed another written statement on 25.07.2011. Learned Court below vide Order Dated 16.08.2011 (impugned in W.P. (C) No. 29756 of 2011) again refused to accept the said written statement. The Petitioners thus, have been obliged to prefer these Writ Petitions.

4. Learned Court below, as found from the impugned order, refused to accept written statements filed by the present Petitioners on both the occasions as they having departed from the original written statement filed by the original Defendant No. 1 Basanta Kumar Mishra, took a different stand.

5. Learned Counsel for the Petitioners with all his vehemence submits that Learned Court below should be held to have exceeded its jurisdiction, as it has tried to regulate the pleadings of the Petitioners by directing them to adopt the pleadings of the original Defendant No. 1. It is further strenuously contended by Learned Counsel for the Petitioners that the Petitioners having impleaded themselves as Defendants under Order 1, Rule 10, CPC, they are not bound by whatever pleadings the original Defendant had filed & it was the duty of the Learned Court below to accept the written statement filed on 20.06.2011 & the

additional written statement filed on 25.07.2011. It is lastly submitted by Learned Counsel for the Petitioners that the written statements filed by the Petitioners are merely explanatory of the stand taken by original Defendant No. 1 late Basanta Kumar Mishra & Learned Court below should have accepted the same after comparison with the original written statement. Learned Counsel for the Petitioners relies on a number of decisions including the one by Hon''ble Supreme Court in the case of Vidyawati Vs. Man Mohan and others, to substantiate his contentions.

6. Mr. A.C. Rao, Learned Counsel appearing for Opp. Party No. 1, before adverting to oppugn contentions raised by Learned Counsel for the Petitioners draws my attention to some facts. It is submitted by Mr. Rao Learned Counsel for Opp. Party No. 1 that original Defendant No. 1 Basanta Kumar Mishra died on 02.08.1999 & Defendant No. 2 Kairu Khamari died on 10.06.1999. The Plaintiff took steps to substitute Defendant No. 1 (a) to 1 (d) in place of Defendant No. 1 late Basanta Kumar Mishra with a further prayer that the Defendant No. 1 (a) be directed to declare the. names & addresses of legal heirs if any left out. No objection was filed to the substitution petition in spite of the suit suffering adjournments from date to date for filing of objection. Ultimately, the petition for substitution of Defendant 1 (a) to 1 (d) was allowed. In spite of sufficiency of service Defendant No. 1 (c) & 1 (d) having not appeared they were set ex parte on 23.08.2002. The substituted Defendant No. 1 (a) & 1 (b) filed a petition under Order 6, Rule 17, C.P.C. for amendment of written statement by deleting Para 10 of the plaint & substituting new paragraph-10 comprising five pages. Said petition was rejected on the ground that the amendment if allowed would change the nature & character of the suit. The aforesaid order of rejection was subject matter of Civil Revision No. 32/35 of 2003 before the Additional District Judge, Sambalpur & W.P. (C) No. 6619 of 2004. Aforesaid W.P. (C) No. 6619 of 2004 was disposed with a direction to the Petitioners therein to move the Trial Court afresh for amendment. Petitioner No. 1 (a) & 1 (b) filed amendment petition under Order 6, Rule 17, C.P.C. afresh. The same was rejected again on the same ground that the amendment if allowed would change the nature & character of the suit. Aforesaid Order was challenged by Defendant No. 1 (c), who had already been set ex parte on 23.08.2002 in W.P. (C) No. 6130 of 2005. The aforesaid Writ Petition was dismissed for non-prosecution & the CMAPL No. 393 of 2009 filed for restoration of the aforesaid Writ Petition to file was also dismissed for non-prosecution. On 17.07.2010 Defendant No. 1 (a) & 1 (b) were also set ex parte & the suit was posted to 25.08.2010 for ex parte hearing. The Defendant No. 1 (a) to 1(c) on 27.09.2010 filed a petition to set aside the ex parte order. The same was rejected & the said order having not been challenged in higher forum has already attained finality. Only on 27.09.2010 present Petitioners, who are daughters of late Basanta Kumar Mishra filed the petition under Order 1, Rule 10, C.P.C. which was rejected, challenged in Writ Petition, remanded & ultimately allowed directing them to file a written statements. They (present Petitioners) having taken a stand contrary to the stand taken by the

original Defendant No. 1. Basanta Kumar Mishra in the written statement filed by him, Learned Court below rightly refused to accept the written statements filed by the present Petitioners.

It is contended by Mr. Rao, Learned Counsel for Opp. Party No. 1 that the Petitioners having been allowed to be impleaded to peruse the claim of adverse possession as advanced by their late father in the written statement filed by him, they cannot take a different stand even though impleaded as parties under Order 1, Rule 10, C.P.C. The Petitioners having already filed their written statements on 07.09.2011, the present Writ Petitions have become infructuous. Lastly, it is contended that the orders impugned having not been shown to have suffered from any error of jurisdiction, or from a breach of principle of natural justice or vitiated by a manifest or apparent error of law or indicative of flagrant abuse of fundamental principles of law, no relief can be granted in these Writ Petitions in as much as this Court cannot assume unlimited prerogative under Article 227 of the Constitution of India to correct all species of hardship or wrong decisions. Mr. Rao also relies on some decisions to substantiate his contentions.

7. Learned Court below vide Order Dated 02.07.2011 ruled thus:

In the decision reported in Babulal N. Shukla Vs. Jeshankar N. Shukla, Hon''ble High Court held that a legal representative substituted in place of a deceased Defendant cannot be permitted to make out a new case afresh in another written statement at this stage. He has to take up the suit at the stage at which it was left when the original party died & to continue it. The only right he has is, to make a defence appropriate to his character as a legal representative of the deceased Defendant. This view has also been reiterated in the decision reported in Saved Sirajul Hasan Vs. Syed Murtaza Ali Khan Bahadur and Others that the written statement filed by the Defendant must be appropriate to his character as legal representative of the deceased Defendant.

In the decision reported in Vidyawati Vs. Man Mohan and others, the Hon''ble Apex Court held that if the L.R. intends to make any personal or individual defence de hors the defence available to the deceased, he/she must get impleaded in his/her personal or independent capacity under Order 1, Rule 10 or retain the right to the independent suit asserting his/her own right, fn the decision reported in Bal Kishan Vs. Om Parkash and Another, the Hon''ble Apex Court also held that Rule 4(2) of Order 22 of C.P.C. authorizes the legal representative of a deceased Defendant or Respondent to file an additional written statement or statement of objections raising all pleas which the deceased tenant had or could have raised except those which were personal to the deceased Defendant or Respondent. So on the rulings as stated above the Defendants who were substituted as legal representative of the original deceased Defendant cannot take different plea with that of the original written statement. In the present case Defendant No. 1 (d) to 1 (9) are substituted as legal representative of original deceased Defendant Basanta Kumar Mishra in para-2 of written statement it is stated that the Defendants also denied those allegation &

adopt the denial pleadings of deceased Defendant No. 1 to the extent that the deceased Defendant No. 2 was not the original owner of the suit land & took a different plea regarding the transfer made by Sahedeb Bhoi to Kairu Khamari & challenged the right title & interest of the Plaintiff by subsequent purchase from Kairu Khamari vide sale deed No. 1392 dt. 28.6.1984. Several pleas were also taken by the substituted Defendants which are not found in the pleadings of the original deceased Defendant No. 1.

8. Learned Counsel for the Petitioners relying heavily on Vidyawati Vs. Man Mohan and others, submits that the Petitioners having got themselves impleaded as parties to the suit under Order 1, Rule 10, C.P.C., observation of Learned Court below as emphasized supra to the extent that the Petitioners were substituted as legal representatives of original Defendant No. 1 late Basanta Kumar Mishra is contrary to the record & such a finding is also not sustainable in the eye of law. It is vehemently submitted by Learned Counsel appearing for the Petitioners that the Petitioners being added as parties under Order 1, Rule 10, C.P.C. they can set up their independent claims even by departing from the pleadings original Defendant No. 1 had filed. To justify reinforcement of his contention Learned Counsel for the Petitioner relies on concluding paragraph of the Judgment in Vidyawati's case which reads thus:

This being the position in law, the view of the Court below is perfectly legal. It is open to the Petitioner to implead herself in her independent capacity under Order 1, Rule 10 or retain the right to file independent suit asserting her own right.

9. If the decision of Hon''ble Supreme Court in Vidyawati's case is read in the light of the facts of that case & provisions contained in Sub-rule (2) of Rule 4 of Order 22, C.P.C. & Order 1 Rule 10, C.P.C. it is to be understood without any ambiguity that legal representative of deceased Defendant is entitled to all the defences which were available to the deceased. The right said legal representative has is limited to make defence appropriate to his character as legal representative of the deceased Defendant & he can also file a written statement bound by such limitation. But if the legal representative intends to make any personal or individual defence dehors the defence available to the deceased he/she must get impleaded in his/her personal or independent capacity under Order 1 Rule 10, C.P.C. or retain the right to file independent suit asserting his/her own right.

10. The Petitioners in this case admittedly have been impleaded under Order 1 Rule 10; C.P.C. vide Order Dated 07.04.2011. The relevant portion of the Order reads thus:

In the present case the deceased Defendant No. 1 in his written statement averred that the Defendant No. 1 resided over the suit land by constructing kharperly house there in or about the year 1971 in his own right, title & interest without any obstruction or objection from any side openly, peacefully, continuously with the knowledge of Sahadeb Bhoi, Kairu Khamari & the present

Plaintiff & thereby perfected his right, title & interest by way of adverse possession. Since the original deceased Defendant No. 1 claimed his right over the suit land by way of adverse possession, so his legal heirs also accrued right, title & interest over the suit land, though the said matter will be decided in the final adjudication of the suit. Hence the legal heirs of the deceased Defendant No. 1 are necessary parties.

The aforesaid order is clearly indicative of the fact that the Petitioners have not been impleaded in their independent or personal capacity. They have been impleaded only on the ground that they are left out legal representatives of deceased Defendant "No. 1 late Basanta Kumar Mishra. If reference is made to the factual matrix brought before me by Mr. C.A. Rao, Learned Counsel appearing for the Opp. Party No. 1, it is found that the Plaintiff (present Opp. Party No. 1) filed appropriate necessary petition to implead wife, two sons & one daughter of deceased Defendant No. 1 late Basanta Kumar Mishra with a further prayer to direct widow of late Basanta Kumar Mishra to disclose the names & addresses of other legal representatives if any left out. After suffering several adjournments said petition was allowed when no objection was filed by the aforesaid legal representatives of late Basanta Kumar Mishra.

The Petitioner, after much time come forward to be Impleaded Order 1 Rule 10, C.P.C. claiming themselves to be legal representatives of late Basanta Kumar Mishra (deceased Defendant No. 1) & the aforesaid order of the Court dated 07.04.2011 clearly shows that they were impleaded under Order, Rule 10, C.P.C. only because they are the left out legal representatives of deceased Defendant No. 1 Basanta Kumar Mishra. It is also not the Petitioner's case that they got themselves impleaded on the basis of their personal or individual claims. They do not deny that they have been impleaded as legal representatives of late Basanta Kumar Mishra. But they claim that they having been impleaded under Order 1, Rule 10, C.P.C. & they having not been substituted, they can file written statement departing from the plea taken by late Basanta Kumar Mishra (original Defendant No. 1).

11. The discussion supra makes it clear that irrespective of the nomenclature or the provisions, under which a person has been brought on record as party, he has to take the character on the ground of which he has been so brought. If the Petitioners have" been impleaded as parties on the ground that they are legal representatives of deceased Defendant No. 1 Basanta Kumar Mishra, irrespective of the fact that they have been so impleaded under Order 1, Rule 10, C.P.C., they cannot depart from the pleadings filed by the deceased Defendant & they cannot claim a right to file a contrary pleading on the basis of individual & independent title. This being the position of law, the view of the Court below is perfect & legal & I do not find justification to interfere with the same. Both the Writ Petitions are accordingly dismissed.