
(1996) 03 OHC CK 0022
In the Orissa High Court
Case No : Second Appeal No. 83 of 1988

State of Orissa

APPELLANT

Vs

Bhanu Mali (Dead) Nurpa Bewa and Others

RESPONDENT

Date of Decision : 29-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, 100, 11, 9, 96, 96
Orissa Prevention of Land Encroachment Act, 1972 — Section 7 , 7

Citation : (1996) 1 OLR 460

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : Additional Government Advocate, for the Appellant; Susanta Dash, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—Defendant is the appellant against a confirming judgment in a suit for declaration of title, confirmation, or in the alternative, recovery of possession.

2. The plaintiffs' case is as follows : The plaintiffs are the descendants of Shiva Mali. The disputed land measuring Ac.3.02 decimals consisting of five plots as described in the plaint schedule is a part of Current Settlement Khata No. 84 of the year 1955-56. Khata No. 84 measuring Ac. 12.58 decimals was recorded in the names of three sons of Shiva Mali, namely Bhanu Mali (plaintiff No. 1), Kanhu Mali and Tila Mali (plaintiff No. 4). Plaintiffs 2 and 3 being the daughters of Kanhu Mali are his successors. During 1970-71, the Tehsildar, Dharamgarh, initiated Encroachment case No. 192/-70-71 against original plaintiff No. 1 alone in respect of plot Nos. 210 and 214, which are part of the disputed land. Plaintiff No. 1 on enquiry, discovered that the disputed lands have been deleted from original Khata No. 84 and were recorded in the name on State of Orissa in a rent abatement proceeding of the Collector, Kalehandi, by order dated 29-3-1961. It is the case of the plaintiffs that the aforesaid rent abatement proceeding was taken up at the back of the plaintiffs and the plaintiffs are continuing in

possession of the disputed lands along with other lands which were part of Khata No. 84. Accordingly, the plaintiffs issued notice u/s 80 of the Code of Civil Procedure, indicating the aforesaid facts. Since there was no reply, the plaintiffs filed the suit claiming declaration of title and confirmation, or in the alternative, recovery of possession.

3. The defendant filed written statement challenging the averments made in the plaint. The jurisdiction of the civil Court to entertain the suit in view of Section 16 of the Orissa Prevention of Land Encroachment Act, 1972 (hereinafter referred to as the "Act") was questioned. It was specifically pleaded that after the initiation of encroachment case No. 192/70-71 against plaintiff No. 1, the latter voluntarily vacated the disputed lands during 1975.

4. During the pendency of the suit, Original plaintiff No. 1, Bhanu Mali, expired and his widow, three sons and three daughters were substituted as plaintiffs 1(a) to 1(g).

5. The trial Court framed seven Issues including Issue No. 2 relating to the jurisdiction of the civil Court. It found that the plaintiffs were in continuous possession of the disputed lands all along and had title in respect thereof. It was further found that the order of the Collector dated 29-3-1961 deleting the disputed plots from the current settlement Record of Rights standing in the names of the plaintiffs was illegal and improper and was not within the knowledge of the plaintiffs. It was further observed that the defendant had failed to prove that original plaintiff No. 1 had vacated plot Nos. 210 and 214 as claimed in the written statement. The suit was found to be maintainable and in time. The trial Court also recorded the finding that no evidence had been led, nor any argument advanced as to why civil Court had no jurisdiction to try the suit and accordingly, the said issue was answered in the affirmative.

6. In appeal preferred by the defendant, it appears that two points, one relating to limitation and the other relating to nonpayment of proper court-fee for the relief of confirmation of possession, or in the alternative, recovery of possession, were pressed into service. Both the contentions were repelled by the lower appellate court. The lower appellate court also incidentally found that the claim of the defendant that plaintiff No. 1 had voluntarily given up possession in 1975 had not been substantiated. The other findings of the trial Court were affirmed in a general manner and the appeal was dismissed.

7. In second appeal, while admitting the appeal, the following substantial question was formulated :--

"Whether the Civil Court has jurisdiction to disturb the finding arrived at which is an order of eviction under the Orissa Prevention of Land Encroachment Act on the facts and circumstances of the case?"

8. The learned Counsel appearing on behalf of the State has contended that in view of Section 16 of the Act, the suit which in effect challenges the validity of

the order of eviction under the Act, is not maintainable. In support of the aforesaid contention, the learned Counsel for the State has placed reliance on the decision of this Court reported in 72 (1992) CLT 860 (Narayana Chandra Yotish v. State of Orissa). The learned Counsel appearing on behalf of the respondents, on the other hand, submitted that the defendant having practically given up the plea of lack of jurisdiction of the civil Court as framed under Issue No. 2, and at any rate, having not raised the question before the lower appellate court, cannot be permitted to raise such question in the second appeal. It was also contended that in view of the finding that the plaintiffs were all along in possession and their names had been illegally and improperly deleted, the order of eviction, if any, cannot stand on the way of the civil Court in granting appropriate relief. It was further contended that the core question relating to the title of either party can be decided only by the civil Court and not by the Revenue Officer in a summary proceeding under the Act. Furthermore a court of limited jurisdiction cannot assume jurisdiction by wrongly deciding a jurisdictional fact.

In reply, the learned counsel for the appellant submitted that in view of Explanation VIII to Section 11 of the CPC (hereinafter referred to as the "Code"), even the decision of a court of limited jurisdiction operates as res judicata and as such the order of the Revenue Officer in the eviction proceeding under the Act shall operate as res judicata to bar the latter suit. He pressed into service the decision of this Court reported in Abhimanyu Jee Vs. Dr. Gayaprasad and Others, .

The rival contentions of the parties require careful consideration.

9. The preliminary objection that the defendant having abandoned the question in the courts below cannot be permitted to raise the same question at the second appellate stage, cannot be sustained as basic question of law pertaining to jurisdiction of the trial Court can always be raised.

10. Section 16 of the Orissa Prevention of Land Encroachment Act reads as follows :--

"16. Bar of suits and proceedings :--

No suit or other legal proceeding in respect of the matters of disputes for determining or deciding which provision is made in this Act shall be instituted in any Court of law except under and in conformity with the provisions of this Act."

No doubt, the decision reported in 723 (1992) CLT 860 fully supports the contention of the appellant. Learned counsel for the respondents has brought to ray notice the Division Bench decisions of this Court reported in Satyabadi Naik Vs. The State of Orissa, and ILR (1980) Cut 582 (Ghasi Khmari v. State of Orissa and contended that the subsequent single Judge decision reported in 73 (1992) CLT 860, having not taken note of the earlier Division Bench decisions should not be followed. He further submitted that while interpreting pan materia provisions of Andhra Pradesh Land Encroachment Act (3 of 1905), the Supreme Court in the decision reported in Government of Andhra Pradesh Vs. Thummala Krishna Rao

and Another, has held that (para 7) :

"... If there is a bona fide dispute regarding the title of the Government to any property, the Government cannot take a unilateral decision in its own favour that the property belongs to it, and on the basis of such decision take recourse to the summary remedy provided by Section 6 for evicting the person who is in possession of the property under a bona fide claim or title. ..."

The apex Court in the aforesaid decision further observed (para 7) :--

"... The summary remedy prescribed by Sections is not the kind of legal process which is suited to an adjudication of complicated questions of title. ..."

In the present case, the title of the State in respect of the disputed land was in question and the very action of the State deleting the name of plaintiff No. 1 and incorporating its own name in a rent abatement proceeding was under challenge. Moreover, the plaintiffs claimed and, it was in fact found, that the plaintiffs were in long possession of the land for more than thirty years prior to the so-called encroachment proceeding. Applying, therefore, the principles of law enunciated in *Government of Andhra Pradesh Vs. Thummala Krishna Rao and Another*, and *Satyabadi Naik Vs. The State of Orissa*, , it must be held that the civil Court had jurisdiction to decide the question raised before it in the present suit. In view of the fact that the subsequent single Judge decision 73 (1992) CLT 860 did not take note of the two Bench decisions of the Orissa High Court arising under the very same Act as well as the decision of the apex Court rendered under an Act containing *pari materia* provisions must be taken to have been wrongly decided.

11. The learned Counsel for the appellant then submitted that in view of Explanation VIII to Section 11 of the Code, which was added by Act 104 of 1976, the decision of the Revenue Officer directing eviction of plaintiff No. 1 must be taken to be *res judicata* in the subsequent suit so far as the question relating to title and possession of the plaintiffs is concerned. It is contended that in view of Explanation VIII, the decision rendered by a court of limited jurisdiction also operates as *res judicata*. In support of the aforesaid contention, he has placed reliance on the decision of this Court reported in *Abhimanyu Jee Vs. Dr. Gayaprasad and Others*, , In the aforesaid decision, it has been clearly held that the decision of the (sic) Rent Controller relating to relationship of landlord and tenant shall operate as *res judicata* in view of Section 11, Explanation VIII of the Code. Though not cited at the bar, I am aware that the aforesaid decision has been approved and followed in many subsequent decisions.

The learned Counsel for the respondents, on the other hand, submitted that a court of limited jurisdiction cannot assume jurisdiction by wrongly deciding jurisdictional facts and such wrong decision of a court of limited jurisdiction will neither operate as *res judicata*, nor bar the jurisdiction of the civil Court to examine the question in a subsequent proceeding, In support of the aforesaid contention, he has placed reliance on the decision reported in AIR 1971 SC 2335 (*Mathura Prasad Sarjoo Jaiswal v. Dossibai N. B. Jeejeebhoy*), *Katikara*

Chintamani Dora and Others Vs. Guntreddi Annamanaidu and Others, ; Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi, and Life Insurance Corporation of India Vs. M/s. Indian Automobiles and Co. and others, .

12. So far as the decision reported in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, is concerned, the principle laid down therein may not be applicable to the facts of this case, as the question of jurisdiction in the said case arose out of a pure question of law and it was held that a wrong decision on question of law relating to jurisdiction of a court may not operate as *res judicata*. The decision of the Supreme Court reported in Katikara Chintamani Dora and Others Vs. Guntreddi Annamanaidu and Others, recognises the well known principle of the finding on jurisdictional facts recorded by a court of limited jurisdiction is not final or conclusive and civil courts have always jurisdiction to decide such a questions notwithstanding the decision of the court of limited jurisdiction. The aforesaid Supreme Court decision has obviously drawn inspiration from the oft-quoted decision of the Privy Council reported in AIR 1940 105 (Privy Council) . However, the aforesaid two decisions of the Supreme Court as well as the decision of the Privy Council had been rendered prior to the introduction of Explanation VIII to Section 11 of the Code. The question remains as to the applicability of these decisions in view of Explanation VIII, which has been subsequently inserted.

The decision in AIR 1982 SC 30 was rendered, of course, after taking cognisance of Explanation VIII and would have ordinarily governed the field. In the said decision, it was held that the decision of a Small Causes Court relating to relationship of landlord and tenant may not operate as *res judicata* in a subsequent regular suit in the civil court notwithstanding the introduction of Explanation 8. However, in the decision reported in Abhimanyu Jee Vs. Dr. Gayaprasad and Others, , Justice R.C. Patnaik (as his Lordship then was) has taken note of the aforesaid Supreme Court decision in Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi, , and distinguished the same while deciding a matter arising out of a proceeding under the Orissa House Rent Control Act. Ordinarily, I would have felt myself bound by the aforesaid decisions of the learned single Judge of Orissa High Court, but for a subsequent decision of the Supreme Court reported in Life Insurance Corporation of India Vs. M/s. Indian Automobiles and Co. and others, . In the aforesaid decision of the Supreme Court, the question was relating to finality of the decision of the Rent Controller on the question of title in a proceeding for fixation of fair rent arising under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The apex Court observed in the aforesaid case that the decision rendered by a court of limited jurisdiction, that is to say, the Rent Control Court, will not operate as *res judicata* in a subsequent civil suit relating to title notwithstanding the terms of Section 11 of the Code including Explanation VIII thereto. The law has been succinctly put in paragraphs 21 and 23 of the aforesaid decision. In view of the aforesaid decision which practically reiterates the well-recognised principles as enunciated in the decision reported in AIR 1940 105 (Privy Council) , and series of Supreme Court decisions

which have been noticed in the said case. I venture to say that the decision of the learned single Judge in *Abhimanyu Jee Vs. Dr. Gayaprasad and Others*, , must be taken to have been impliedly overruled. As a matter of fact, though not cited at the Bar, subsequent decisions of the Orissa High Court reported in *Manika Dei and Others Vs. Dhadia Madgul and Others*, ; 67 (1989) CLT 408 (*Bijay Kumar Agarwalla v. Durgabai Sharma*); 70 (1990) CLT 767 (*Laxmidhar Sahu and after him Haramani Dei v. Gauranger Charan Sahu*) and 76 (1993) CLT 794 (*Ramachandra Panda v. Indramani Mohapatra*) which have either relied upon or/and taken similar view as in *Abhimanyu Jee Vs. Dr. Gayaprasad and Others*, , must also be taken to have been wrongly decided so far as the question of res judicata relating to the finding of jurisdictional fact by a court of limited jurisdiction is concerned, in view of the aforesaid decision of the Supreme Court in AIR 1991 SC 894, and it must be held that the earlier Division Bench decisions of the Orissa High Court in ILR (1965) Cut 539 *Beharilal Neparam (Firm) v. Urdhaba Charan Sahu*) and ILR (1965) Cut 574 (*Keshari Devi v. Bhagabati Prasad Patodia*) arising out of proceedings under the Orissa House Rent Control Act still hold the field.

13. In view of the aforesaid principles of law, specially in view of the decisions of the Supreme Court reported in *Government of Andhra Pradesh Vs. Thummala Krishna Rao and Another*, and *Life Insurance Corporation of India Vs. M/s. Indian Automobiles and Co. and others*, , I hold that the so-called decision of the Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act can neither operate as res judicata, nor Section 16 thereof can stand as a bar relating to the question of title in the subsequent civil suit by the plaintiffs-respondents. Accordingly, all the contentions raised by the counsel for the appellant fail and the appeal is liable to be dismissed.

14. Even otherwise, the second appeal is bound to be dismissed on another ground. As already noticed, original plaintiff No. 1 had expired during the pendency of the suit and his legal representatives had been substituted as plaintiff Nos. 1(a) to 1(g) in the trial court itself. The present appellant filed Title Appeal No. 6/10 of 1984/87 impleading original plaintiff No. 1. In other words, the substituted plaintiffs 1(a) to 1(g) who had succeeded in the trial court were not impleaded as respondents in the title appeal filed by the present appellant. Subsequently, when the matter was discovered during the pendency of the second appeal, plaintiffs 1(a) to 1(g) were brought on record in the second appeal by order dated 31-7-1989. While passing that order, this Court had specifically indicated that it was open for the respondents to make any legal submission on the ground of non-maintainability of the appeal in question. The subsequent impleading of plaintiffs 1(a) to 1(g) at the second appellate stage cannot cure the defect of, non-impleading (non-impleading) of necessary parties in the title appeal. All the plaintiffs including plaintiffs 1(a) to 1(g) had succeeded in the trial court and in appeal carried out by the defendant, plaintiffs 1(a) to 1(g) were necessary parties and in their absence, the title appeal itself was liable to be dismissed. Since the title appeal was not

maintainable in the absence of all the successful plaintiffs and could have been dismissed on that ground, the present appellant cannot take advantage of its own mistakes at the second appellate stage.

Thus, in any view of the matter, the second appeal has no merit and is hereby dismissed. In the circumstances, there will be no order as to costs.

15. I must place on record my appreciation for the commendable manner in which Mr. Susenta Dash, the learned counsel for the respondents, has made research and cited relevant and apt decisions.