

Khalli Sahu Vs. State of Orissa and Another

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Court : Orissa

Decided On : May-17-2012

Appellant : Khalli Sahu

Respondent : State of Orissa and Another

Advocate for Pet/Ap. : Mr. Mishra

Judgement :

ORISSA HIGH COURT : CUTTACK SECOND APPEAL No.9 OF 2000. From a judgment and decree dated 1.11.2000 and 13.11.2000 respectively passed by Shri M. P. Mishra, learned District Judge, Ganjam in Title Appeal No.9 of 2000 confirming the judgment dated 19.1.2000 passed by Shri A.M. Das, learned Civil Judge (Junior Division), Berhampur in Title Suit No.99 of 1992. -----Khalli Sahu Appellant -versus State of Orissa & another For Appellant : For Respondents : Respondents M/s. H.S.Mishra, A.K.Mishra & T.K. Sahoo. Addl. Govt. Advocate. -----Decided on 17.05.2012 -----PRESENT: THE HONOURABLE MR. JUSTICE M. M. DAS M.M. DAS, J.-----This Second Appeal arises out of a confirming judgment in a suit filed by the appellant for declaring that the retracted action taken by the succeeding Tahasildar recalling the orders of his predecessor, on the face of it, is null and void and for declaring the right, title, interest and possession of the plaintiff over the suit land with a consequential relief for permanent injunction against the defendants restraining them from interfering with his right, title, interest and possession over the suit land

2. Plaintiffs case is that he is an ex-army personnel and served in the Indian Army in the rank of Sepoy from 26.8.1963 to 21.8.1969 in the Bihar Regiment and also a permanent landless resident of Berhampur town. The plaintiff also pleaded that on 26.8.1963, during emergency recruitment, in the exigency of the Chinese War, his date of birth was recorded as 26.8.1963 so as to suit the norms of the recruitment to show him as 18 years of age though he was 21 years of age by then and the plaintiff could not raise any strenuous protest in that regard. The father of the plaintiff was in possession and enjoyment of a piece of land measuring Ac. 1.20 cents, the nature of which was Tank Paramboke., pertaining to sabik survey No.182/2 of Bhapur village. In course of time, the character of the land was changed and it was turned to cultivable land with a house constructed by his father, which was used by his father for the purpose of residence and also as a farm house. The plaintiffs father was possessing the suit land long prior to 1949 to the knowledge of one and all including the revenue authorities. In 1961, when the father of the plaintiff was unable to look after the cultivation of the land due to old age and prolonged ailment, all the rights and interest accrued on account of his long standing possession was thereafter exercised by the plaintiff and since then, the plaintiff is in continuous possession of the land and the house standing thereon and is cultivating the said land by hired labourers. When he was serving in the Indian Army, he entrusted the land to the tenants on oral lease, who were paying the produce to the plaintiff through his father.

3. In course of time, the value of the said land has increased. In the year 1970, the Revenue Inspector of Bhapur Circle obstructed the plaintiff from possessing the land and on his report, the Tahasildar started an encroachment case being L.E.C. No.578 of 1971 against the plaintiff, whereupon an enquiry was conducted by the Tahasildar, who found that the encroached area had itself lost its old character and that the plaintiff is a poor and landless person as well as an ex-army personnel entitled to get the land settled in his favour and thus, passed order directing his office to send the record to the Sub-Divisional Officer for the said purpose. The order was passed on 5.11.1979. As per order dated 10.5.1982, the Tahasildar also invited objections from general public as well as the Municipality, but none raised any objection for settlement of the land in favour of the plaintiff. In the meantime, there was a bifurcation of the village and the area was renamed as

Sashibhusanpur under the revenue circle of Haridakhandi and the Survey No.182/2 measuring Ac. 1.20 cents was changed into hal plot Nos. 1783/1, 1784 and 1785/1 and the classification was changed into some other character. The order of the Tahasildar passed earlier, to settle the land in favour of the plaintiff was No.adhered to and the subsequent Tahasildar in the office in the said proceeding for eviction of the plaintiff, passed an 4 order of eviction on 26.9.1986. The plaintiff challenged the said order of eviction in an appeal before the Sub-Divisional Officer, Berhampur and thereafter, being unsuccessful, in a revision before the Additional District Magistrate, Ganjam Berhampur and again in revision case before the Revenue Divisional Commissioner, Berhampur, but in vain. He then served notice under section 80 C.P.C. against defendant nos. 1 and 2 and after following due procedure filed the suit for the above noted reliefs. The defendants filed a written statement denying the plaint allegations. In the written statement, while admitting that upon report of the R.I., the Tahasildar started an encroachment case, being L.E. Case No.578 of 1971 against the plaintiff, it was pleaded that the land being classified as Tank Paramboke. and being situated within the limit of Berhampur Municipality area, the same canNo.be settled in favour of the plaintiff under the O.G.L.S. Rules, 1983. They specifically denied the allegation that the plaintiffs father possessed the said land by pleading that neither the plaintiffs father was in possession No.the plaintiff is in possession over the suit land from the year 1961. They asserted that the plaintiff was No.in continuous possession till the year 1970, when the land encroachment case was initiated against him in the year 1971. Thus, they denied the claim of adverse possession made by the plaintiff.

4. The learned trial court, on the above pleadings, framed the following issues:

5. (i) Whether the suit is maintainable ?. (ii) (iii) Whether the plaintiff or his predecessor has perfected their title over the suit land by adverse possession ?. (iv) Whether the eviction order dated 23.9.86 passed by the defendant no.1 against the plaintiff is valid and binding upon the plaintiff ?.. (v) Whether the suit is barred by limitation. (vi) 5. Whether the plaintiff has cause of action in the suit ?. What other reliefs, if any, the plaintiff is entitled to ?. The plaintiff examined three witnesses and exhibited twelve documents whereas the defendants examined one

witness and exhibited three documents.

6. The learned trial court after hearing the suit by his judgment dated 19.1.2000 passed in the said suit being T.S. No.99 of 1992 came to the finding that the plaintiff is in possession over the suit land for a period of 21 years and, therefore, he has No.perfected his title by way of adverse possession against the State. The plaintiff failed to establish that the procedure under the O.P.L.E. Act has No.been followed according to law. Therefore, the order of the Tahasildar in L.E.C. No.578 of 1971 for eviction of the plaintiff is binding upon the plaintiff, after the plaintiff failed to get any relief in appeal and the two revisions. Holding thus, the learned trial court dismissed the suit. The plaintiff carried an appeal against the said judgment and decree of the learned trial court being T.A. No.9 of 2000 before the learned 6 District Judge, Ganjam, Berhampur. The appellate court holding that the plaintiff has No.pleaded as to from when he came into possession over the disputed property and the pleadings of the plaintiff with regard to the adverse possession is vague and there is no documentary evidence in support of the claim of the plaintiffs adverse possession from the time of his father, confirmed the finding of the learned trial court. The lower appellate court also held that since in such cases, the civil courts jurisdiction is barred, the proceeding under the O.P. L.E. Act must be deemed to be a suit for the purpose of limitation and such period of limitation should be computed till the year 1971 and No.1992 as held by the learned trial court. It further held that the jurisdiction of the civil court is specifically barred and the civil court canNo.interfere with the proceeding initiated under the O.P.L.E. Act. Thus, the learned appellate court held that it was No.within the jurisdiction of the learned Civil Judge (Jr. Division), Berhamapur to interfere with the Tahasildars order or to record a finding that the Tahasildars order dated 26.9.1986 was invalid and illegal and the order dated 10.5.1984 passed by the Tahasildar sending the proposal to the S.D.O. for changing the classification of the suit land, was an interlocutory order and could be recalled at any time. The said order was also No.binding on the SubDivisional Officer which was his discretionary power to change the classification. Thus, the civil court canNo.force the Revenue 7 Authorities to exercise their discretion in favour of the plaintiff. The appellate court also observed that as an ex-army man, the plaintiff will be entitled to settlement of agricultural land, but he canNo.claim such right within the municipal

area for settlement of land in order to construct a residential house over a vast patch of land measuring Ac. 1.20 cents. Observing thus, the learned appellate court dismissed the appeal. Hence, this Second Appeal.

7. The Second Appeal has been admitted on the following substantial question of law: Whether in view of section 16 of the O.P.L.E. Act, the suit of the present nature would be a bar ?.

8. During the pendency of the Second Appeal, the appellant -plaintiff has filed Misc. Case No.17 of 2011 under Order 41, Rule 27 C.P.C. for producing additional evidence. The respondent -State has also filed Misc. Case No.324 of 2011 under the same provision for producing additional evidence. In the Misc. Case No.17 of 2011 filed by the appellant-plaintiff , the appellant has stated that during the pendency of the Second Appeal, one Shri Mahamad Amit Pasa, son of late Mohamad Zaffer of Bhapur, Khaja Street, Berhampur town had claimed title over a piece of land, which was in possession of his father till his death and after death of his father, he continued to possess the same and in that case also, proceeding under the O.P.L.E. Act was initiated, where, the said plaintiff was found to be an encroacher and, thereafter, the said plaintiff filed a 8 suit claiming title by way of adverse possession, which has been decreed and, thus, the judgment passed in the said suit is required to be taken into evidence. However, this Court is of the view that neither the said judgment has any relevance to decide the present suit filed by the appellant No.the judgment of the trial court in another suit can be treated as a precedent. Hence, this Court is of the view that the said judgment is No.required to be produced to enable the Court to pronounce a judgment in the present appeal.

9. State, In Misc. Case No.324 of 2011 filed by the respondentthe respondent has claimed that during hearing of the Second Appeal, the counsel for the appellant has raised a contention that even though as per Ext. 5, the order dated 5.11.1979 passed by the then Tahasildar, the case was recommended to the Sub-Divisional Officer for change of classification of the land as it has lost its character as Tank Paramboke. holding the plaintiff being an ex-army personnel and a landless person, the land can be settled in his favour, but the Tahasildar subsequently

reviewed his own order and passed the order of eviction which was confirmed in appeal and revisions. Learned counsel for the State, while on verification of the records of L.E.C. No.578 of 1971, found that M.C. No.6 of 1984 has been instituted and the recommendation of the Tahasildar has been turned down by the Sub-Divisional Officer in pursuance of the observation of the Additional District Magistrate that no Government 9 land in urban areas shall be settled for agricultural purpose. Basing on the said observation of the Sub-Divisional Officer, the Tahasildar by his order dated 18.3.2005 in Misc. Case No.6 of 1984 directed to drop the Misc. Case and proceeded with the encroachment case for evicting the plaintiff. It is, therefore, stated in the petition that the copy of the extract of the order dated 18.3.2005 passed by the Tahasildar in Misc. Case No.6 of 1984, which has been filed before this Court, is required to be produced as additional evidence for just decision of the appeal.

10. Order 41, Rule 27 C.P.C. prescribes that the parties to an appeal shall No.be entitled to produce additional evidence, whether, oral or documentary, in the appellate court, unless the court from whose decree the appeal is preferred, has refused to admit evidence, which ought to have been admitted or the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was No.within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed or the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. Only if the above conditions are fulfilled, the appellate court may allow such evidence or documents to be produced and if such evidence is allowed to be produced, the appellate court is 10 required to record the reason for its admission into evidence. Though it is stated in the Misc. Case petition filed by the respondents that in spite of due diligence, the copy of the above document could No.be obtained for production before the court below, but since it is admitted that the document is available in the case record of the Land Encroachment Case, it canNo.be accepted that notwithstanding exercise of due diligence, such evidence was No.within the knowledge of the respondent-State or could No.after exercise of due diligence be produced by it in the court below. This Court finds that the said documents produced before this Court is also required for enabling this

Court to pronounce the judgment in the Second Appeal. Hence, both the Misc. Cases stand dismissed.

11. No. coming to the question of law on which the Second Appeal has been admitted, it is seen that Section - 16 of the Orissa Prevention of Land Encroachment Act, 1972 bars suits and proceedings. For better appreciation, Section - 16 of the O.P.L.E. Act is quoted hereunder: 16. Bar of suits and proceedings - No suit or other legal proceedings in respect of the matter 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.

12. In a Full Bench decision of this Court in the case of Maguli Jal and others v. Bhagaban Rai and others AIR 197.Orissa 219 the question of exclusion of jurisdiction of the civil courts came up for consideration. The Full Bench laid down the following principles as well settled principles of law : (i) Exclusion of the jurisdiction of Civil Court is not to be readily inferred. Such exclusion must either be explicitly expressed or clearly implied. (ii) Even if jurisdiction is so excluded, Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Civil Court would interfere if it finds the order of the special tribunal is unfair, capricious or arbitrary. (iii) Where a liability not existing at common law is created by statute which at the same time gives a special and particular remedy for enforcing it, a remedy provided by the statute must be followed and the Courts jurisdiction is ousted. The scheme of the particular Act is to be examined to see if remedies normally associated with actions in Civil Suits are prescribed by the statute. (iv) The Legislature may entrust the special tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to do something more. The Legislature shall have to consider whether there shall be an appeal from the decision of the tribunal as otherwise there will be none. In cases of this nature, the tribunal has jurisdiction to determine all facts including the existence of preliminary facts on which exercise of further jurisdiction depends. In the exercise of the

jurisdiction the tribunal may decide facts wrongly or if no appeal is provided therefrom there is no appeal from the exercise of such jurisdiction. (v) Even in a case when the Civil Court would have jurisdiction on a finding that the special tribunal has acted beyond the scope of its authority as in point No.(ii), it canNo.substitute its own decision for that of the tribunal but would give a direction to dispose of the case in accordance with law.. 12 In the case of Seth Radha Kishan v. Administrator, Municipal Committee, Ludhiana, AIR 196.SC 1547.the apex Court held that in case where the jurisdiction of the civil court has been expressly barred, a suit should No.be entertained, but a suit in the civil court will always lie to question the order of a Tribunal created by a statute, even if its order, expressly or by necessary implication, is final, if the said Tribunal abused its power and has No.acted under the Act, but in violation of its provision. The Constitution Bench in the case of Ram Swarup and others v. Shikar Chand and another, AIR 196.SC 89.placing reliance upon large number of judgments including the judgment in the case of the Secretary of State for India in Council v. Roy Jatindranath Choudhury and another, AIR 192.PC 17.laid down that the jurisdiction of the civil courts to deal with the civil cases can be excluded by the legislature by Special Acts, which may deal with special subject matters, but the statutory provision must and expressly provided for such exclusion or must necessarily and inevitably lead to that inference. However, the said bar would No.be relevant, if the plea raised before the civil court goes to the route of the matter and if upheld, will lead to the conclusion that the impugned order is a nullity. Yet in another Constitution Bench decision, in the case of Dhulabhai etc. v. State of Madhya Pradesh and another, AIR 196.SC 78.it was held that exclusion of jurisdiction of the civil court 13 by an express provision may No.be a complete bar to entertain a suit, if a party satisfies the civil court that the statutory provision has No.been followed in conformity with the fundamental principles of the judicial procedure. More so, the statutory Tribunal must be competent to provide all remedies normally associated with the action of the civil court, which may be prescribed by the said statute or more. It was laid down that the exclusion of jurisdiction of the civil court is No.readily to be inferred unless the aforesaid conditions are fulfilled.

13. There are abandoned authorities, where it has been held that the civil courts jurisdiction is available wherever the action of the statutory authority is found to be without jurisdiction, even in spite of a bar of such jurisdiction of the civil court provided in the Act. Examining the bar as provided in Section - 16 of the Act, as quoted above vis--vis the pleadings of the appellant - plaintiff, it is found that the appellant - plaintiff pleaded that in L.E.C. No.578 of 1971 initiated against the appellant - plaintiff, the Tahasildar conducted an enquiry and found that the encroached area has lost its old character and that the appellant - plaintiff is a poor landless person as well as an ex-army person, entitled to get the sand land settled in his favour and thus passed order directing his office to send the record to the S.D.O. Subsequently, the Tahasildar also invited public objections from the general public as well as from the Municipality, but none 14 raised any objection for settlement of the land in favour of the appellant - plaintiff.

14. As such, in view of the above, the civil court has the jurisdiction to examine as to whether the subsequent Tahasildar could have done away with the said order and directed eviction of the appellant - plaintiff from the disputed property, as the question raised by the appellant - plaintiff goes to the root of the matter. Hence, the learned lower appellate court was No.correct in concluding that the jurisdiction of the civil court is specifically barred and the civil court canNo.interfere with the proceeding initiated under the OPLE Act and further holding that it was No.within the jurisdiction of the learned Civil Judge (Junior Division), Berhampur to interfere with the Tahasildars order by recording a finding that the order of the Tahasildar dated 23.09.1986 was No.invalid and illegal and that the earlier order passed by the predecessor of the said Tahasildar sending the proposal to the S.D.O. for changing the classification of the land was an interlocutory order, which could be recalled at any time.

15. It was further contended by Mr. Mishra, learned counsel for the appellant - plaintiff that the learned courts below, even though technically held that the appellant - plaintiff has No.perfected his title by way of adverse possession, but they should have treated the same to be a lost grant. and should have examined the evidence in that context

16. Considering the above contention, this Court finds that the other substantial question of law, which is involved in this Second Appeal is as to whether the learned courts below have committed an error of law in No. considering the case by applying the doctrine of lost grant. by taking into consideration the alleged long possession of the appellant - plaintiff over the disputed property.

17. Mr. Mishra, learned counsel, while contending that the learned courts below have wrongly applied Article 112 of the Limitation Act to the facts of the case, also placed reliance on the decision in the case of Lingaraj Samantaray v. Shree Sidha Ballava Jew, 1984 (I) OLR 67. in support of the contention that this is a fit case where the doctrine of lost grant. is squarely applicable and the learned courts below erred in No. examining the evidence on record in that angle. For the above purpose, he also relied upon a decision in the case of Raja Braja Sundar Dev and another v. Moni Behera and others, AIR 195. SC 24. and other case laws.

18. Since this Court finds that the said question has No. been determined by the learned courts below and this Court finding that the learned lower appellate court was wrong in holding that the jurisdiction of the civil court was barred under Section 16 of the Act proposes to remit this case to the learned lower appellate court it is felt necessary also to examine the contention of the appellant 16 - plaintiff with regard to his claim over the disputed property by application of the doctrine of lost grant..

19. In the result, therefore, the impugned judgment and decree of the learned lower appellate court is set aside and the matter is remitted back to the learned lower appellate court for disposing of the appeal afresh in the light of the observations made above. For the above purpose, the parties are directed to appear before the learned lower appellate court on 20.6.2012, when the learned lower appellate court shall proceed to hear the appeal afresh as directed above. Since the appeal is an old one, the learned lower appellate court shall do well to expedite the hearing of the same so as to dispose of the said appeal by the end of September, 2012. This Second Appeal is accordingly allowed. M. M. DAS, J. Orissa High Court, Cuttack. May 17th ,2012/Biswal. 17