

Khetramohan Baral and ors. Vs. Moni Behera and ors.

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Court : Orissa

Decided On : Oct-12-1961

Reported in : AIR1962Ori128

Judge : R.L. Narasimham, C.J. and ;R.K. Das, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 152 - Order 22, Rules 3, 4 and 11

Appeal No. : Second Appeal No. 71 of 1959

Appellant : Khetramohan Baral and ors.

Respondent : Moni Behera and ors.

Advocate for Def. : L. Mohanty, ;H.M. Das and ;R.N. Sinha, Advs.

Advocate for Pet/Ap. : L.K. Dasgupta, ;S. Misra, ;V. Pasayat and ;B. Mohapatra, Advs.

Judgement :

Narasimham, C.J.

1. This is a defendants' second appeal against the appellate judgment of the Additional District Judge of Cuttack-Dhenkanal in Title Appeal No. 44 of 1956 maintaining the; judgment of the Munsif, Second Court, Cuttack, decreeing the plaintiffs' suit (No. 211 of 1950) for a declaration that they Were cash-paying

occupancy raiyats in respect of the disputed lands, and for other consequential reliefs.

2. In the aforesaid suit there were 16 plaintiffs of whom plaintiff No. 4 . was one Dhadi Behera. All the plaintiffs are descended from a common ancestor named Panu Behera. The disputed plots were recorded in the current settlement as the occupancy holdings of one Ganeswar Mohanty and his co-sharers who , were the predecessors-in-interest of the defendants. The plaintiffs alleged that the settlement entries were in correct that the status of the defendants was that of tenure-holders and not that of occupancy raiyats and that the plaintiffs were the occupancy raiyats in respect of the disputed lands. The plaintiffs claimed joint interest in the property and there was no allegation either in the plaint or even in the written statement of the defendants that the interests of the various plaintiffs were severable. The main issue in this litigation, was whether the settlement entries were incorrect and Whether the plaintiffs' status was that of occupancy raiyats and not of mere sikimi tenants as recorded in the current settlement papers.

During the progress of the suit before the learned Munsif, one Shashi Dei, on 31st January 1955, applied to that court for being substituted in place of her father Dhadi Behera (who was reported to be dead) and for amending the plaint accordingly. A copy of this petition was served on all the parties, and on the 10th February, 1955 the learned Munsif wrote in the order-sheet that though both parties were present, no objection was filed to the substitution of Shashi Dei in place of her deceased father Dhadi Behera. Then on the 23rd February 1955 he passed the following order :

'Both parties file respective haziras. The amendment petition is put up. It is allowed. Substitute as prayed for. To 28-3-55 for trial. Parties to come ready.'

Due to some negligence in the Munsif's office this order was not implemented and the plaint was not corrected by scoring through the name of Dhadi Behara and inserting that of Shashi Dei in his place. The parties also omitted to remind the court about this matter. The result was that when the judgment was pronounced in favour of the plaintiffs and when the decree was drawn up the name of Dhadi

Behera continued to be shown as one of the plaintiffs in the decree. In the appeal filed by the defendants before the Additional District Judge (Title Appeal No. 44 of 1956) Dhadi Behera's name was shown as respondent no. 4. The other plaintiffs who filed a cross-appeal also showed the name of Dhadi Behera in their grounds of cross appeal.

In the decree of the lower appellate court also, the same error continued and though the defendants' appeal was dismissed Dhadi Behera was shown as one of the respondents (respondent No. 4). Similarly, in the second appeal filed before this court the name of Dhadi Behera was shown as respondent No. 4. But during the pendency of the appeal the defendants seem to have discovered this mistake and the appellants' Advocate filed a petition on 4th March 1960 pointing out that Dhadi Behera died during the pendency of the suit in the Munsifs court but that the appellants came to know about it, for the first time, only on 19th Nov. 1959. The appellants therefore requested this court to allow the substitution of the name of Shashi Dei in place of Dhadi Behera, in case the court did not hold the decree of the lower court to be a nullity.

A single Judge of this court on 28th April 1960 dismissed this petition for substitution. There was some controversy between the parties as to whether the entire appeal would abate as Dhadi's interest was not severable; from that of the other plaintiffs; and the court by its order dated 1st August 1960 reserved this question for consideration; at the time of the hearing of the appeal on merits. So far as this appeal is concerned this was the main question argued before us.

3. During the hearing of the appeal Mr. R. N. Sinha on behalf of Shashi Dei filed a petition before this court, on the 17 August 1961 requesting us to direct an amendment of the decree of the trial court by substituting her name in place of Dhadi Behera as plaintiff No. 4 urging that the failure on the part of the Bench clerk of the Munsif's court to implement the order of the Munsif dated 23rd February 1955 (already quoted) was a clerical mistake which could be corrected even at the second appellate stage. The appellants however objected to such a correction at this stage saying that it would prejudicially affect their interests and that the Prayer ought to have been made earlier. This question may be disposed of in the first

instance.

4. There can be no doubt that due to the mistake of the Bench clerk and the failure of the parties also to invite the attention of the Munsif to his order dated 25th February 1955, the substitution was not made. If the plaint had been immediately corrected and Shashi Dei's name had been substituted in place of Dhadi Behera, the latter's name would not have appeared in the decree of the trial court, or in the appeal petition filed before the lower appellate court, or before this court. As no party should be prejudiced by the court's order, following the well known legal maxim *actus curiae neminem gravabit* that mistake should be corrected even though it was brought to the notice of this court at the second appellate stage. The argument of learned counsel for the appellants, Mr. B. Mohapatra that the parties were also guilty of negligence, will not suffice to justify rejection of the prayer to make this correction. The order of the Munsif was passed in the presence of the parties. The parties were fully aware, on 23rd February 1955, of the death of Dhadi Behera and of the court's orders for substituting his daughter's name in the plaint. They never cared to invite the attention of the court to the mistake which crept in the decree and to get it corrected. They cannot therefore say that it was the court's mistake in showing the name of Dhadi Behera in the decree that misled them in the subsequent stages. Similarly, the fact that the other plaintiffs in their cross-appeal before the lower appellate court continued to show the name of Dhadi Behera, will not excuse the negligence of the appellants who were also equally aware of the true facts. In any case there is no reason why Shashi Dei should be, penalised for the negligence either of the remaining plaintiffs or of the defendant-appellants. Once her petition for substitution was allowed she was entitled to assume that the court would implement its own order in due course. For these reasons I am of opinion that the amendment of the plaint, as prayed for, must be allowed even at this second appellate stage and the decree of the trial court must be corrected by substituting her name in place of the deceased Dhadi Behera as directed by the learned Munsif on 23rd February, 1955.

5. The effect of this order on the abatement of the appeal may now be considered. As Shashi Dei was not made a party either in the lower appellate court, or in this court, the appeal must abate so far as her interest in the suit property is

concerned. The belated demand made by the appellants to gether name substituted in this court, was rejected by the learned single Judge of this Court on the 28th April 1960. The appellants' statement made, before that Judge, that they knew for the first time about the death of Dhadi Behera, only on 19th November 1959 was obviously untrue, because the order directing substitution was passed by the trial court as early as the 23rd February 11955. That order was also passed in the presence of both parties. By their own gross negligence they have allowed the appeal before the learned Additional District Judge and also the present second appeal before us, to abate so far as Shashi Dei's interests are concerned. There may be contributory negligence, partly of the Bench clerk of the Munsif's court land partly of the remaining plaintiffs but that cannot affect the position.

6. As Shashi Dei's interests are, joint with those of the other plaintiffs and not severable, the consequence must necessarily be the abatement of the entire appeal as a whole. Otherwise there will be a conflict between, the decisions of two courts in respect of the same property which must be avoided. If the trial court's decree to the effect, that Shashi Dei's interest in the property is that of an occupancy raiyat is no longer open to challenge, this court cannot even if the appellants succeed on merits, come to a contrary finding in respect of the interests of the remaining co-plaintiffs which are joint and not severable. I would accordingly hold that the appeal has abated as a whole.

7. The judgment and decree of the trial court must stand, after substituting the name of Shashi Dei as plaintiff No. 4, and the appeal must be dismissed as having abated. Both parties will bear their own cost throughout,

R.K. Das, J.

8. I agree.