

Sabitrdei and Others

Vs

Sarat Chandra Rout and Others

Civil Appeal No. 2620 of 1996

(K. Ramaswamy, G. B. Pattanaik JJ)

02.02.1996

JUDGMENT

PATTANAİK J.

1. Leave granted.

2. This appeal is directed against the judgment of the Orissa High Court dated 19-4-1993 in Civil Revision No. 403 of 1987 arising out of a petition filed under Section 47 of the Code of Civil Procedure in Execution Case No. 110 of 1981. The judgment-debtor is the appellant in this Court. The deceased Jai Rout had filed a suit for recovery of possession in the Court of Munsif, Cuttack which was registered as Title Suit No. 243 of 1953, the same suit was decreed on 30-3-1965. The decree became final inasmuch as the appeal against decree was dismissed on the ground of abatement and the said order of abatement was also sustained in Civil Revision No. 252 of 1974 by the order of the High Court dated 15-10-1976. In the meantime the suit property which is admittedly an intermediary estate stood vested with State of Orissa by virtue of a notification dated 27-4-1963 under Section 3(1) of the Orissa Estates Abolition Act (hereinafter referred to as 'the Act'). The plaintiff decree-holder deceased Jai Rout levied execution by filing an application which was registered as Execution Case No. 110 of 1981. The judgment-debtor filed an objection under Section 47 challenging the executability of the decree in question. The executing court by its order dated 10-3-1987 allowed the application under Section 47, CPC filed by the judgment-debtor and dropped the execution case on a finding that the property in question has been vested in the State Government and is no longer available to be executed under the decree. The decree-holder, deceased Jai Rout challenged the said order of the existing court by filing a revision in the High Court. During the tendency of the said revision, decree-holder having died, the legal representatives were substituted who are the respondents in this appeal. The High Court came to the conclusion that notwithstanding the vesting of the estate under the Act, the question whether the right of the decree-holder had extinguished is not open to be raised in the execution proceeding because of the principle of constructive res judicata. The High Court also came to the conclusion that the decree in question cannot be held to be a nullity as the civil court had the jurisdiction in the suit for recovery of possession and Section 39 of the Act does not take away that jurisdiction. With these conclusions the order of the Munsif having been set aside and the executing court having been directed to execute the decree, the judgment-debtors are in appeal to this Court.

3. Mr. P. N. Misra, learned counsel appearing for the appellant contends that the suit in question having been filed on the basis of the proprietary right of the plaintiff and that right having vested in the State free from all encumbrances on and from the date of notification under Section 3 of the Act dated 27-4-1963, the decree-holder did not have any existing right in the property and therefore is

not entitled to execute the decree in question and the High Court committed error in brushing aside this question by applying the principle of res judicata. Mr. Misra further contended the notification under Section 3(1) of the Act having been issued on 27-4-1963 and the property in question not having been settled with the intermediary under Section 6 of the Act, the civil court had no jurisdiction to pass a decree in March 1965 and thus the decree in question is a nullity. The principle of res judicata will not be attracted and invalidity of the decree can be set up whenever it is sought to be enforced or acted upon as a foundation for a right even at the stage of execution or in any collateral proceeding. Mr. Mohanty, learned counsel appearing for the respondents on the other hand contended that the decree in question cannot be held to be a nullity as the civil court cannot be said to be having inherent lack of jurisdiction. He also contended that Section 6 of the Act overrides the other provisions of the Act and therefore the deemed settlement as contemplated under Section 6 on the intermediary does not divest the intermediary of his right to recover possession and in this view of the matter the High Court was fully justified in directing execution of the decree in question.

4. Having heard the learned counsel for the parties and on examining the different provisions of the Orissa Estates Abolition Act, we find sufficient force in both the contentions raised by Mr. Misra, learned counsel for the appellant. Two questions really arise for our consideration :

(1) Whether the decree in question can be held to be a nullity?

(2) Whether the plaintiff decree-holder having lost his right of proprietorship in the property, the executing court can refuse to execute the decree?

5. For adjudicating both these questions it will be necessary to examine the different provisions of Orissa Estates Abolition Act and accordingly the relevant provisions of the Act are extracted hereinafter in extenso. Section 3 of the Act states thus :

"3. Notification vesting an estate in the State. - (1) The State Government may, from time to time by notification, declare that the estate specified in the notification has passed to and become vested in the State free from all encumbrances.

(2) The notification referred to in sub-section (1) shall contain particulars of the estate including the touzi number, if any, and the name and the address of the Intermediary as recorded in the registers maintained by the Collector, or as far as is otherwise ascertainable by him and shall be published in the Gazette and shall be affixed in a conspicuous place for a period of not less than fifteen clear days in the office of the Collector.

(3) Such publication shall be conclusive evidence of the notice of the declaration to everybody whose interest is affected by it."

Section 3-A of the Act states thus :

"3-A. Vesting Intermediary interest. - (1) Without prejudice to the powers under the last preceding section, the State Government may by notification declare that the intermediary interests of all Intermediaries or a class or classes of Intermediaries in the whole or a part of the estate have passed to and become vested in the State free from all encumbrances.

(2) The notification referred to in sub-section (1) shall be published in the Gazette

and on such publication shall be conclusive evidence of the notice of the declaration to everybody whose interest is affected thereby."

Section 6 of the Act states thus :

"6. Homesteads of Intermediaries and buildings together with lands on which such buildings stand in the possession of Intermediaries and used as golas, factories or mills to be retained by them on payment of rent. - (1) With effect from the date of vesting, all homesteads comprised in an estate and being in the possession of an Intermediary on the date of such vesting, and such buildings or structures together with the lands on which they stand, other than any buildings used primarily as offices or kutcheries or rest-houses for estate servants on duty as were in the possession of an Intermediary at the commencement of this Act and used as golas (other than golas used primarily for storing rent in kind), factories or mills for the purpose of trade, manufacture or commerce, or used for storing grains or keeping cattle or implements for the purpose of agriculture and constructed or established and used for the aforesaid purposes before 1-1-1946, shall, notwithstanding anything contained in this Act, be deemed to be settled by the State Government with such Intermediary and with all the shareholders owning the estate, who shall be entitled to retain possession of such homesteads and of such buildings or structures together with the lands on which they stand, as tenants under the State Government subject to the payment of such fair and equitable ground-rent as may be determined by the Collector in the prescribed manner :

Provided that where the Intermediaries have come to any settlement among themselves regarding the occupation of buildings and file a statement to that effect before the Collector, the buildings shall be deemed to have been settled with the Intermediaries according to that settlement :

Provided further that homesteads in actual possession of the Intermediary shall be settled with him free of ground-rent in those areas where no ground-rent is charged under the existing law on homestead lands.

#(2) * * * *##

(3) Notwithstanding anything contained in sub-section (1), where an Intermediary constructed a building or structure in his estate after 1-1-1946 and used it on the date of vesting for the purposes mentioned in sub-section (1), he may be entitled to retain possession of such building or structure together with the land on which it stands as a tenant under the State Government subject to the payment of ground-rent as provided in sub-section (1) only if the Collector, after an enquiry, is satisfied that it is constructed or used for a bona fide purpose and not with a view to defeat the provisions of Section 5 of this Act."

Section 8-A of the Act states thus :

"8-A. Filing of claims under Sections 6, 7 and 8 and dispute relating thereto. - (1) The Intermediary shall file his claim in the prescribed manner for settlement of fair and equitable rent in respect of lands and buildings which are deemed to be settled with him under Section 6 or Section 7 before the Collector within six months from

the date of vesting.

(2) Any person who is discharged from the conditions of personal service under sub-section (3) of Section 8 may file his claim in the prescribed manner before the Collector within six months from the date of vesting for settlement of the lands held under the terms and conditions of such service :

Provided that the Collector shall, as soon as may be after any such claim under sub-section (1) or sub-section (2) is filed, give public notice thereof by beat of drum in the appropriate locality and by placards posted at such conspicuous places as he deems fit, inviting objections from persons interested :

Provided further that in respect of estates which have vested in the State Government prior to the date of commencement of the Orissa Estates Abolition (Second Amendment) Act, 1957 (Orissa Act 3 of 1958), the claims mentioned in sub-sections (1) and (2) shall be filed before the Collector within a period of six months from the said date :

Provided also that the State Government may further extend the period specified in the last preceding proviso up to a maximum period of one year for any sufficient cause in any case or class of cases :

Provided also that the claims on behalf of an Intermediary in respect of any estate which has vested in the State Government or after 18-3-1974 but before the date of commencement of the Orissa Estates Abolition (Amendment) Act, 1974, may, where such claim relates to a trust estate, be filed before the Collector within a period of six months from the date of commencement of the said Act :

Provided also that such claim as aforesaid which has been filed after 18-9-1974 and before the date of commencement of the said Act shall, for all purpose, be treated as a claim filed within the period of limitation;

(3) On the failure of filing the claims within the period specified under this section the provisions of clause (h) of Section 5 shall, notwithstanding anything to the contrary in Sections 6, 7 and 8, apply as if the right to possession of the lands or buildings or structures, as the case may be, had vested in the State Government by the operation of this Act and thereupon the right to make any such claim as aforesaid shall stand extinguished :

Provided that when such failure is due to the pendency of proceedings in a Court of Law in which the validity of any notification under Section 3 or 3-A is in dispute, the State Government may by order specially made in that behalf, extend the period for filing of the claim.

(4) Any person disputing the claim as to the extent or possession of such lands or buildings or structures, as the case may be, may file an objection before the Collector within three months from the date of the public notice under sub-section (2) of such claim and the Collector shall, prior to the determination of rent under Sections 6, 7 and 8, enquire into the matter in the manner prescribed and pass such order as he deems just and proper.

(5) Without prejudice to the provisions contained in sub-section (4), where a claim in respect of any estate is made by the Intermediary on the ground that it is a trust estate, the Collector shall, whether or not any objection is filed under the said sub-section make a reference to the Tribunal constituted under Section 8-D for determining whether the estate is a trust estate or not and shall act according to the orders passed by the said Tribunal :

Provided that in the case of any estate referred to in the proviso to clause (oo) of Section 2, no such reference shall be necessary."

Section 39 of the Act states thus :

"39. Jurisdiction of civil courts in certain matters. - No suit shall be brought in any civil court in respect of any entry in or omission from a Compensation Assessment Roll or in respect of any order passed under Chapters II to VI or consuming any matter which is or has already been the subject of any application made or proceedings taken under the said Chapters."

6. Coming to the first question, it is apparent that on issuance of a notification under Section 3(1) of the Act, the estate vests free from all encumbrances in the State Government. The pre-existing rights shall cease to exist and new rights have been created under the Act. By virtue of Section 6 the Homesteads of Intermediaries and buildings together with lands on which buildings stand in the possession of Intermediaries and used as golas, factories or mills to be retained by them on payment of rent. But the preconditions in a deemed settlement for fixation of rent as contemplated under Section 6 must be satisfied namely the land must be in possession of the Intermediary and the same must be in use as golas, factories or mills. Under sub-section (3) of Section 8-A if no claim is filed within the specified period then the right to possess the land or building or structure, as the case may be, stands vested in the State Government by operation of the Act and thereupon the right to make any such claim by the Intermediary stands extinguished. It is admitted by the parties that the Intermediary had not filed any claim within the stipulated period and in fact no settlement of rent had been made with the Intermediary under Section 6. Such a settlement could not have been made as admittedly the defendant-judgment-debtor is in possession of the land. This being the position, on and from the date of issuance of notification under Section 3(1) of the Act that is 27-4-1963, the civil court loses jurisdiction in respect of the disputed property by operation of Section 39 of the Act and consequently the decree passed on 30-3-1965 must be held to be a nullity. Once a decree is held to be a nullity, the principle of constructive res judicata will have no application and its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in any collateral proceeding. This question no longer remains res integra and has been so held in the case of Sushil Kumar Mehta v. Gobind Ram Bohra [(1990) 1 SCC 193] to which one of us (brother Ramaswamy, J.) was a member. It has been held in the aforesaid case :

"Thus it is settled law that normally a decree passed by a court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. A decree passed by a court without jurisdiction over the subject-matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a coram non iudice. A decree passed by

such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party. If the court has jurisdiction but there is defect in its exercise which does not go to the root of its authority, such a defect like pecuniary or territorial could be waived by the party. They could be corrected by way of appropriate plea at its inception or in appellate or revisional forums, provided law permits. The doctrine of res judicata under Section 11 CPC is founded on public policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them. Thus the decision of a competent court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a court unrelated to questions of fact or law or mixed questions does not operate as res judicata even between the parties or persons claiming under them. The reason is obvious; a pure question of law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The decision on an issue of law founded on fact in issue would operate as res judicata. But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibition by law it does not operate as res judicata. Thus a question of jurisdiction of a court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction."

7. The ratio of the aforesaid case fully applies to the facts and circumstances of the case in hand. Mr. Mohanty appearing for the respondents did not challenge the proposition of law but contended that Section 6 of the Act confers a deemed right of settlement with the Intermediaries in respect of the disputed property and that provision overrides the other provisions of the Act and therefore Section 39 of the Act will have no application. We are unable to persuade ourselves to agree with the submission made by Mr. Mohanty as the said submission does not take into consideration the provisions of sub-section (3) of Section 8-A. In our considered opinion the estate in question having been vested by virtue of notification under Section 3(1) of the Act and no claim having been made by the Intermediary for getting deemed settlement of fixation of rent, by operation of sub-section (3) of Section 8-A, the right of the Intermediary stands extinguished and therefore under such circumstances the civil court had no jurisdiction to pass the decree in the year 1965. Consequently the decree in question is a nullity and the executing court can refuse to execute the decree. The High Court was in obvious error in directing execution of the decree.

8. So far as the second question is concerned, the same also has been directly answered by a

decision of this Court in the case of Haji Sk. Subhan v. Madhorao [1962 Supp (1) SCR 123 : AIR 1962 SC 1230]. The identical provisions of Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 was being considered by this Court. This Court came to hold that the proprietary rights in an estate specified in the notification passed from the proprietor and became vested in the State free from all encumbrances and therefore after issue of the notification under Section 3 notwithstanding anything contained in any contract, grant or document or any other law for the time being in force, all rights, title and interest which a proprietor possessed on account of his proprietorship of the land within the estate became vested in the State. Consequently the provisions of Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 deprived the proprietor of his proprietary rights including the right to recover possession over the land in the suit. This Court also further held that the executing court has a right to refuse to execute the decree upholding that the decree has become inexecutable on account of the change in law and its effect. What has been stated by this Court in relation to the provision of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 would have full application to the provisions of the Orissa Estates Abolition Act with which we are concerned in the present case. In this view of the matter the proprietary rights of the plaintiff Intermediary became vested in the State of Orissa. The plaintiff could not execute the decree for recovery of possession.

9. In our considered opinion the executing court rightly refused to execute the decree and the High Court was in error in setting aside the said order of the executing court. In the aforesaid premises the order of the High Court passed in Civil Revision No. 403 of 1987 is set aside. This appeal is allowed. The execution proceedings stands annulled. There will be no order as to costs.