

**HIGH COURT OF ORISSA: CUTTACK**

**W.P. (C) NO. 12880 OF 2011**

In the matter of an application under Articles 226 and 227 of the Constitution of India.

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Bibhuti Bhusan Swain & another        .....        Petitioners

-Versus-

Khirod Chandra Swain                        .....        Opposite Party

For Petitioners        --        M/s.Ramakanta Mohanty,  
D.Mohanty, S.Mohanty  
D.Varadwaj, A.Mohanty,  
B.Kumar, A.S.N.Biswal.

For Opposite Party --        M/s. Jameswar Das,  
H.S.Mangaraj, S.K.Routray  
A.K.Dash.

**PRESENT:**

**THE HONOURABLE SHRI JUSTICE B.K.MISRA**

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**Date of judgment: 23.04.2012**

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**B.K.MISRA, J.**        In this writ petition, the present petitioners, who are Defendants in C.S. No.135 of 2008 (pending in the court of learned Civil Judge (Sr. Divn.), 2<sup>nd</sup> Court, Cuttack) being aggrieved with the order dated 2.4.2011 have approached this Court for quashing the impugned order at Annexure-1 i.e. the order passed refusing the abatement of the aforementioned suit under Section 4(4) of the Orissa Consolidation of

Holdings and Prevention of Fragmentation of Land Act, 1972 (for short the 'Act').

2. Admittedly, Civil Suit No.135 of 2008 was filed by the Plaintiff who is the Opposite Party in this writ petition for a declaration that the compromise decree in Title Suit No.105 of 1989 dated 12.3.1991 was a collusive and fraudulent decree and thus no title is derived by the Defendant No.1 basing upon such a fraudulent decree. When the said suit was pending in the court below Defendant No.2 was set exparte and accordingly one petition was filed by the Defendant No.2, namely, the present Opposite Party no.2 on 16.3.2011 under Order 9, Rule 7 of the Civil Procedure Code (for short 'C.P.C.') for setting aside the exparte order as against him and to permit him to adopt the written statement so filed by the Defendant No.1. Similarly, on the very same day i.e. on 16.3.2011 the Defendant No.1 filed another petition for abatement of the suit under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act. The learned court below considered both the petitions on merit and after hearing the parties dis-allowed the prayer of Defendant No.1 for abatement of the suit but allowed the prayer of Defendant No.2 in setting aside the exparte order passed against him. The learned court below allowed Defendant No.2 to be brought on record and accepted his prayer for adopting the written statement which has been filed by the Defendant No.1.

3. In this writ petition challenge has been made to the order of the learned court below with regard to refusal of the prayer for abatement of the suit as consolidation operation was going on in respect of the suit village when the suit was filed and also the Trial Court did not take into consideration the order of this Court in W.P(C ) No.9109 of 2007 dated 20.9.2010 wherein this Court up-held the order of abatement of the suit i.e. C.S.No.174 of 2006 in which also the present parties were involved. Learned counsel appearing for the petitioners in course of argument drew my attention to the order of this Court in W.P(C) No.9109 of 2007 dated 20.9.2010 and also by placing reliance in a decision of this Court in **1990(1) O.L.R. 496, Akuli Mallik @ Jena -v- Kusa Jena and others** contended that the learned Trial Court should have passed order with regard to abatement of the suit in view of the consolidation operation which going on in respect of the suit village. It was also very seriously contended that the suit of the plaintiff is not at all maintainable in view of the provisions of Section 96(3) and order 43 Rule-1-A (2) and Order 41, Rule 27 of the Civil Procedure Code. It was also contended that when a party claims that he had either no consent or consent was not voluntary the bar under Order 23, Rule-3-A of the C.P.C. is applicable and an appeal would lie as the decree passed on compromise operates "in presenti". In that context, reliance was placed in a judgment of this Court reported in **1993 (1) OLR 90, Hakimatum Nisa Bibi -v- Md. Fakiruddin Khan and others.**

4. In this case we are concerned only with the legality of the order passed by the learned Civil Judge (Sr.Divn.), 2<sup>nd</sup> Court, Cuttack in refusing abatement of the suit i.e. C.S. No.174 of 2006 under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972.

5. The question to be considered is whether the suit as laid can be entertained by the Civil Court in view of the provisions contained in Section 51 of the Consolidation Act which makes provisions regarding the ouster of jurisdiction of Civil Courts. In order to decide the question, it is incumbent upon the Court to ascertain the nature and scope of the suit by going through the pleadings of the parties. It is to be remembered that the ouster of the jurisdiction of the Civil Court is not to be readily inferred and care should be taken to see that the person aggrieved is not left without a forum to redress his grievance. No doubt the important aspect to be considered as to whether the Consolidation Authorities have the power/competence to grant relief sought for in the suit. In the instant case, a plain reading of the plaint and the prayer shows that it was a suit for a declaration that the compromise decree in the earlier suit i.e. T.S. No.105 of 1989 was the outcome of fraud, collusion and not binding on the plaintiff. This Court in ***Bhubaneswar Mishra and another -v- Srimati Ujalamani Devi and another*** as reported in ***1980 (Vo.50) CLT 100*** has categorically held that when the suit relates to a decree that the earlier compromise decree was not binding and was bad, no relief under the Consolidation

Act can be obtained and the Consolidation Authorities cannot declare the Civil Court decree bad and no relief can be granted by the Consolidation Authorities even if the consolidation operation was in progress and in that context this Court has specifically held that the suit does not abate so far as it relates to the declaratory relief that the compromise decree does not bind the plaintiff. Learned court below has referred to the decision of this Court i.e. Bhubaneswar Mishra's Case (Supra). The learned court below has rightly observed that the decision of this Court rendered in W.P.(C) No.9109 of 2007 is not applicable to the facts of this case. Accordingly, I do not find any reason to interfere with the impugned order especially with regard to the refusal of prayer for abatement of the suit.

6. Now coming to the next argument of the learned counsel for the petitioners that the suit is not maintainable in view of the bar contained under Order 23, Rule-3-A of the C.P.C. I refrain from expressing any opinion on that as such a point was never agitated by the present petitioners in the court below.

In the result, the writ petition stands dismissed without interfering with the impugned order at Annexure-1.

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**B.K. Misra, J.**

